FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1933

No.....(Original)

STATE OF ARIZONA

Complainant,

VS.

STATE OF CALIFORNIA, STATE OF COLORADO, STATE OF NEVADA, STATE OF NEW MEXICO, STATE OF UTAH, STATE OF WYOMING, HAROLD L. ICKES, Secretary of the Interior of the United States, PALO VERDE IRRIGATION DISTRICT, a public corporation of the State of California, IMPERIAL IRRIGATION DISTRICT, a public corporation of the State of California, COACHELLA VALLEY COUNTY WATER DISTRICT, a public corporation of the State of California, METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, a public corporation of the State of California, CITY OF LOS ANGELES, a municipal corporation of the State of California, CITY OF SAN DIEGO, a municipal corporation of the State of California, and COUNTY OF SAN DIEGO, a public corporation of the State of California,

Defendants.

MOTION FOR LEAVE TO FILE BILL TO PERPETUATE TESTIMONY

and

BILL TO PERPETUATE TESTIMONY

and

STATEMENT AS TO JURISDICTION

ARTHUR T. LAPRADE,
Attorney General of the State of Arizona, Solicitor for Complainant.

CHARLES A. CARSON, JR.
A. M. CRAWFORD,
Of Counsel.

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Defendants.

MOTION FOR LEAVE TO FILE BILL TO PERPETUATE TESTIMONY

The State of Arizona, appearing by its Attorney General, respectfully moves and prays the Court for leave to file its bill to perpetuate testimony, herewith submitted.

ARTHUR T. LAPRADE,
Attorney General of the State of Arizona, Solicitor for Complainant.

CHARLES A. CARSON, JR.
A. M. CRAWFORD,
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Defendants.

BILL TO PERPETUATE TESTIMONY

The State of Arizona, appearing by its Attorney General, by leave of Court files this, its bill to perpetuate testimony, and respectfully alleges:

I

That the State of Arizona, complainant herein, and the States of California, Colorado, Nevada,

New Mexico, Utah and Wyoming, defendants herein, are state of the Union, duly admitted thereto and exercising equal sovereignty with the original and all other States of the Union. Defendant Harold L. Ickes, is the duly appointed, qualified and acting Secretary of the Interior of the United States. The Palo Verde Irrigation District, the Imperial Irrigation District, the Coachella Valley County Water District and the Metropolitan Water District of Southern California, and each of them, are public corporations organized and existing under and by virtue of the laws of the State of California in said State. The City of Los Angeles and the City of San Diego, and each of them, are municipal corporations organized and existing under and by virtue of the laws of the State of California, in said State. The County of San Diego is a quasi municipal and public corporation, organized and existing under and by virtue of the laws of the State of California, in said State.

II

That this bill is filed for the sole purpose of perpetuating testimony.

III

That the complainant, at sometime in the future will commence an action, or actions, in this Court against the above named defendant States, or some of them, and against the above named corporations and municipal corporations of the State of

California, or some of them, and against the present Secretary of the Interior of the United States, or his successor in office, arising out of the controversy hereinafter set forth. That the testimony of certain persons now living will be material and necessary evidence on behalf of complainant in said action, or actions, which said testimony will be lost unless the same is perpetuated in this proceeding. That at the present time the complainant's cause and causes of action have not accrued and may not accrue for some years to come.

IV

That the nature of the controversy which is expected to be the subject of said action, or actions, to be commenced in this Court, is as follows:

(a) The Colorado River and its tributaries drain all or portions of the States parties hereto, and flow through or on the borders of each of said States. Some portion of the waters of said Colorado River and its tributaries is now beneficially and consumptively used in each of said States and each of said States claim the right to appropriate and beneficially use additional waters from said Colorado River and its tributaries.

(b) All the land in the State of Arizona is arid in character. There are in Arizona more than 2,000,000 acres of land which are not now irrigated, but which are susceptible of irrigation from the waters of the Colorado River and its tributaries, and

which cannot be irrigated by any other means or from any other source. All of said land is extremely fertile and when irrigated will be very productive. The future welfare, growth, population and prosperity of the State of Arizona depends upon irrigation of said lands from said Colorado River.

(c) That on August 19, 1921, there was passed by the Congress of the United States (42nd Statutes at Large, page 171) an Act which authorized the States of Arizona, California, Colorado, Nevada, New Mexico, Utah and Wyoming to enter into a compact regarding the waters of the Colorado River, which said Act was and is in words and figures as follows, to-wit:

> "An act to permit a compact or agreement between the States of Arizona, California, Colorado, Nevada, New Mexico, Utah and Wyoming, respecting the disposition and apportionment of waters of the Colorado River, and for other purposes (Act August 19, 1921, ch. 72, 42 Stat. 171.).
>
> (Sec. 1. Preamble—Apportionment of waters—Federal representative to be appointed—Expenses—Approval.) — Whereas the Colorado River and its several tributaries rise within and flow through or from the boundaries between the States of Arizona, California, Colorado, Nevada, New Mexico, Utah and Wyoming; and

Whereas, the territory included within the drainage area of the said stream and its tributaries is largely arid and in small part irrigated, and the present and future development necessities and general welfare of each of said States and of the United States require the further use of the waters of said streams for irrigation and other beneficial purposes, and that future litigation and conflict respecting the use and distribution of said waters should be avoided and settled by compact between said States; and

Whereas, the said States, by appropriate legislation, have authorized the governors thereof to appoint commissioners to represent said states for the purpose of entering into a compact or agreement between said States respecting the future utilization and disposition of the waters of the Colorado River and of the streams tributary thereto; and

Whereas, the governors of said several States have named and appointed their respective commissioners for the purposes aforesaid, and have presented their resolution to the President of the United States requesting the appointment of a representative on behalf of the United States to participate in said negotiations and to represent the interests of the United States; Now, therefore,

BE IT ENACTED BY THE SENATE AND HOUSE OF REPRESENTATIVES OF THE UNITED STATES OF AMERICA IN CONGRESS ASSEMBLED, That consent of Congress is hereby given to the States of Arizona, California, Colorado, Nevada, New Mexico, Utah and Wyoming to negotiate and enter into a compact or agreement not later than January 1, 1923, providing for an equitable division and apportionment among said States of the water supply of the Colorado River and of the streams tributary thereto, upon condition that a suitable person, who shall be appointed by the President of the United States, shall participate in said negotiations, as the representative of and for the protection of the interests of the United States, and shall make report to Congress of the proceedings and of any compact or agreement entered into, and the sum of $10,000, or so much thereof as may be necessary, is hereby authorized to be appropriated to pay the salary and expenses of the representative of the United States appointed hereunder: PROVIDED, That any such compact or agreement shall not be binding or obligatory upon any of the parties thereto unless and until the same shall have been approved by the legislature of each of said States and by the Congress of the United States. (42 Stat. 171).

Sec. 2. (Right to amend reserved.)—That the right to alter, amend, or repeal this act is herewith expressly reserved. (42 Stat. 172.)."

That acting under and pursuant to the provisions of said Act, the President of the United States appointed Honorable Herbert Hoover as the representative of and for the protection of the interests of the United States in the negotiations therein authorized. The State of Arizona appointed Honorable W. S. Norviel as its representative. The State of California appointed Honorable W. F. McClure as its representative. The State of Colorado appointed Honorable Delph E. Carpenter as its representative. The State of Nevada appointed Honorable J. G. Scrugham as its representative. The State of New Mexico appointed Honorable Stephen B. Davis, Jr., as its representative. The State of Utah appointed Honorable R. E. Caldwell as its representative. The State of Wyoming appointed Honorable Frank C. Emerson as its representative.

That the said several State representatives and their advisors and agents, with the said Honorable Herbert Hoover, representative of the United States, and his advisors and agents, met on sundry and divers occasions and conferred on the matter of division of the waters of the Colorado River pursuant to the provisions of said act of Congress.

That Honorable Clarence C. Stetson, now of

the State of Maine, was named executive secretary of said meetings.

That it was concluded by the said representatives in their negotiations that insufficient information was available to justify a division of the waters among the several states, as such, and a plan was evolved to divide the states into two groups, one designated as the Upper Basin and the other as the Lower Basin. The term Upper Basin was used to designate those parts of the States of Arizona, Colorado, New Mexico, Utah and Wyoming within and from which waters naturally drain into the Colorado River system above Lee Ferry. The term Lower Basin was used to designate those parts of the States of Arizona, California, Nevada, New Mexico and Utah within and from which waters naturally drain into the Colorado River system below Lee Ferry and also all parts of states located without the drainage area of the Colorado River system, which then or thereafter should be beneficially served by waters from the system below Lee Ferry.

The Honorable Richard E. Sloan, former Governor of the Territory of Arizona, now deceased, as legal advisor on behalf of the State of Arizona, the Honorable Thomas E. Campbell, then Governor of the State of Arizona, and the Honorable C. C. Lewis, then Assistant Water Commissioner of the State of Arizona, attended said conference as advisors to the Honorable W. S. Norviel, the official

presentative of the State of Arizona at said con-
rence.

At the conference between said representa-
ves, it was proposed to define the Colorado River
stem as including the main stream of said Colo-
do River and all of its tributaries within the
nited States of America. This definition included
e waters of the Gila River and its tributaries in
rizona. The waters of the Gila River and its trib-
aries at that time were substantially appropriated
d so far as the development thereof had then pro-
essed, all of the waters thereof were then in use.
ne representatives of the State of Arizona, objected
the inclusion of the Gila River and its tributaries
the definition of the Colorado River system to be
portioned by the proposed compact, said repre-
ntatives were seeking to negotiate, on account of
e fact that the waters of the said Gila River and
s tributaries were then appropriated and in use
d the further fact that the waters of the Gila
ver enter the main stream of the Colorado River
a point so far down stream and of such low ele-
tion that it was and is impossible to put the wa-
rs thereof to beneficial use in the United States
ter they reach the main stream of the Colorado
ver and that no other state was or could be inter-
ted therein.

A draft of the proposed compact, based on
e inclusion of the Gila River and its tributaries
thin the definition of the Colorado River system,

and the division of the waters thereof between the upper basin and the lower basin, as hereinbefore defined, was prepared and submitted to said conference. The representatives of all the States and the United States except the Arizona delegation were in agreement as to the definition of the Colorado River system, including the Gila River and its tributaries, and as to the division proposed, which substantially apportioned the waters of the Colorado River at Lee Ferry, the point selected as dividing the Upper Basin from the Lower Basin. The Arizona delegation refused and declined to accept the proposed compact because of the inclusion of the Gila River and its tributaries without any compensating provision to the State of Arizona in lieu of the waters thereof, which had already been appropriated and in which no other State could have any interest on account of the further fact that the waters of the Gila River and its tributaries enter the Colorado River at Yuma, at a point so far down stream and of such low elevation that it was and is impossible to put the waters thereof to beneficial use in the United States after they reach the main stream of the Colorado River. Hence, the Arizona delegation pointed out that the conference was discussing something which had already been disposed of and in any event could not concern any State, other than Arizona. Several days elapsed in a discussion between the said representatives of this problem before a solution was found. The problem was finally thought

ved by adding Subdivision (b) of Article III to
compact as finally approved by said representa-
es, which reads as follows:

> "(b) In addition to the apportionment in paragraph (a), the Lower Basin is hereby given the right to increase its beneficial consumptive use of such waters by one million acre-foot per annum."

It was agreed between all of the representa-
es of the various States and the representative of
e United States, negotiating said compact, that
d one million acre-feet apportioned by subdivision
) of Article III of said compact was intended for
d should go to the State of Arizona to compensate
the waters of the Gila River and its tributaries
ing included within the definition of the Colorado
ver system and the allocations of said compact,
d that said one million acre-feet was to be used ex-
sively by and for the State of Arizona, that being
e approximate amount of water then in use within
e State of Arizona from the Gila River and its
butaries, and it was agreed that in view of the
ct that no appropriation or allocation of water had
herwise been made by said compact directly to any
ate, the one million acre-feet for the State of Ari-
na should be included in said compact by an alloca-
n for the Lower Basin. And it was further
reed that a supplemental compact between the
ates, California, Nevada and Arizona should be

adopted and that such supplemental compact should so provide.

The Arizona delegation stated that if it were agreed by all of the representatives of the several States and of the United States that said million acre-feet should be for the exclusive benefit of the State of Arizona to provide compensation to Arizona on account of the inclusion of the waters of the Gila River and its tributaries in said compact, they would accept said compact, otherwise they would refuse to accept said compact. It was thereupon agreed by all representatives of all the States and of the United States, participating in said negotiations and conference, that the waters apportioned by Article III, (b), of said compact were for the sole and exclusive use and benefit of the State of Arizona, and it was further agreed that a supplemental compact between the States of California, Nevada and Arizona should be adopted and that such supplemental compact should so provide. Thereupon said compact was signed by the representatives of the several States and of the United States. The compact as finally signed at Santa Fe, called the Colorado River Compact, was and is in words and figures as follows, to-wit:

COLORADO RIVER COMPACT

The States of Arizona, California, Colorado, Nevada, New Mexico, Utah, and Wyoming, having resolved to enter into a com-

pact under the act of the Congress of the United States of America approved August 19, 1921, (42 Stat. L., P. 171), and the acts of the legislatures of the said States, have through their governors appointed as their commissioners; W. S. Norviel for the State of Arizona, W. F. McClure for the State of California, Delph E. Carpenter for the State of Colorado, J. G. Scrugham for the State of Nevada, Stephen B. Davis, Jr., for the State of New Mexico, R. E. Caldwell for the State of Utah, Frank C. Emerson for the State of Wyoming, who, after negotiations participated in by Herbert Hoover, appointed by the President as the representative of the United States of America, have agreed upon the following articles:

ARTICLE I. The major purposes of this compact are to provide for the equitable division and apportionment of the use of the waters of the Colorado River system; to establish the relative importance of different beneficial uses of water; to promote interstate comity; to remove causes of present and future controversies and to secure the expeditious agricultural and industrial development of the Colorado River Basin, the storage of its waters, and the protection of life and property from floods. To these ends the Colorado River Basin is divided into two basins and an appor-

tionment of the use of part of the waters of the Colorado River system is made to each of them with the provision that further equitable apportionments may be made.

ARTICLE II. As used in this compact—

(a) The term "Colorado River system" means that portion of the Colorado River and its tributaries within the United States of America.

(b) The term "Colorado River Basin" means all of the drainage area of the Colorado River system and all other territory within the United States of America to which the waters of the Colorado River system shall be beneficially applied.

(c) The term "States of the upper division" means the States of Colorado, New Mexico, Utah and Wyoming.

(d) The term "States of the lower division" means the States of Arizona, California and Nevada.

(e) The term "Lee Ferry" means a point in the main stream of the Colorado River, 1 mile below the mouth of the Paria River.

(f) The term "Upper Basin" means those parts of the States of Arizona, Colorado, New Mexico, Utah, and Wyoming within and from which waters naturally drain into the

Colorado River system above Lee Ferry, and also all parts of said States located without the drainage area of the Colorado River system which are now or shall hereafter be beneficially served by waters diverted from the system above Lee Ferry.

(g) The term "Lower Basin" means those parts of the States of Arizona, California, Nevada, New Mexico, and Utah within and from which waters naturally drain into the Colorado River system below Lee Ferry, and also all parts of said States located without the drainage area of the Colorado River system which are now or shall hereafter be beneficially served by waters diverted from the system below Lee Ferry.

(h) The term "domestic use" shall include the use of water for household, stock, municipal, mining, milling, industrial and other like purposes, but shall exclude the generation of electrical power.

ARTICLE III. (a) There is hereby apportioned from the Colorado River system in perpetuity to the upper basin and to the lower basin, respectively, the exclusive beneficial consumptive use of 7,500,000 acre-feet of water per annum, which shall include all water necessary for the supply of any rights which may now exist.

(b) In addition to the apportionment in Paragraph (a), the lower basin is hereby given the right to increase its beneficial consumptive use of such waters by 1,000,000 acre-feet per annum.

(c) If, as a matter of international comity, the United States of America, shall hereafter recognize in the United States of Mexico any right to the use of any waters of the Colorado River system, such waters shall be supplied first from the waters which are surplus over and above the aggregate of the quantities specified in paragraphs (a) and (b); and if such surplus shall prove insufficient for this purpose, then, the burden of such deficiency shall be equally borne by the upper basin and the lower basin, and whenever necessary the States of the upper division shall deliver at Lee Ferry water to supply one-half of the deficiency so recognized in addition to that provided in paragraph (d).

(d) The States of the upper division will not cause the flow of the river at Lee Ferry to be depleted below an aggregate of 75,000,000 acre-feet for any period of 10 consecutive years reckoned in continuing progressive series beginning with the first day of October next succeeding the ratification of this compact.

(e) The States of the upper division shall

not withhold water, and the States of the lower division shall not require the delivery of water, which cannot reasonably be applied to domestic and agricultural uses.

(f) Further equitable apportionment of the beneficial uses of the waters of the Colorado River system unapportioned by paragraphs (a), (b) and (c) may be made in the manner provided in Paragraph (g) at any time after October 1, 1963, if and when either basin shall have reached its total beneficial consumptive use as set out in paragraphs (a) and (b).

(g) In the event of a desire for a further apportionment as provided in paragraph (f) any two signatory States, acting through their governors, may give joint notice of such desire to the governors of the other signatory States and to the President of the United States of America, and it shall be the duty of the governors of the signatory States and of the President of the United States of America forthwith to appoint representatives, whose duty it shall be to divide and apportion equitably between the upper basin and lower basin the beneficial use of the unapportioned water of the Colorado River system as mentioned in paragraph (f), subject to the legislative ratification of the signatory States and the Congress of the United States of America.

ARTICLE IV. (a) Inasmuch as the Colorado River has ceased to be navigable for commerce and the reservation of its waters for navigation would seriously limit the development of its basin, the use of its waters for purposes of navigation shall be subservient to the uses of such waters for domestic, agricultural and power purposes. If the Congress shall not consent to this paragraph, the other provisions of this compact shall nevertheless remain binding.

(b) Subject to the provisions of this compact, water of the Colorado River system may be impounded and used for the generation of electrical power, but such impounding and use shall be subservient to the use and consumption of such water for agricultural and domestic purposes and shall not interfere with or prevent use for such dominant purposes.

(c) The provisions of this article shall not apply to or interfere with the regulations and control by any State within its boundaries of the appropriation, use and distribution of water.

ARTICLE V. The chief official of each signatory State charged with the administration of water rights, together with the Director of the United States Reclamation Service

and the Director of the United States Geological Survey, shall co-operate, ex-officio—

(a) To promote the systematic determination and co-ordination of the facts as to flow, appropriation, consumption, and use of water in the Colorado River Basin, and the interchange of available information in such matters.

(b) To secure the ascertainment and publication of the annual flow of the Colorado River at Lee Ferry.

(c) To perform such other duties as may be assigned by mutual consent of the signatories from time to time.

ARTICLE VI. Should any claim or controversy arise between any two or more of the signatory States: (a) With respect to the waters of the Colorado River system not covered by the terms of this compact; (b) Over the meaning or performance of any of the terms of this compact; (c) as to the allocation of the burdens incident to the performance of any article of this compact or the delivery of waters as herein provided; (d) as to the construction or operation of works within the Colorado River Basin to be situated in two or more States, or to be constructed in one State for the benefit of another State; or (e) as to the diversion of water in one State for the

benefit of another State, the governors of the States affected upon the request of one of them, shall forthwith appoint commissioners with power to consider and adjust such claim or controversy, subject to ratification by the legislatures of the States so affected.

Nothing herein contained shall prevent the adjustment of any such claim or controversy by any present method or by direct future legislative action of the interested States.

ARTICLE VII. Nothing in this compact shall be construed as affecting the obligations of the United States of America to Indian tribes.

ARTICLE VIII. Present perfected rights to the beneficial use of waters of the Colorado River system are unimpaired by this contract. Whenever storage capacity of 5,000,000 acre-feet shall have been provided on the main Colorado River within or for the benefit of the lower basin, then claims of such rights, if any, by appropriators or users of water in the lower basin against appropriators or users of water in the upper basin shall attach to and be satisfied from water that may be stored not in conflict with Article III.

All other rights to beneficial use of waters of the Colorado River system shall be

satisfied solely from the water apportioned to that basin in which they are situate.

ARTICLE IX. Nothing in this compact shall be construed to limit or prevent any State from instituting or maintaining any action or proceeding, legal or equitable, for the protection of any right under this compact or the enforcement of any of the provisions.

ARTICLE X. This compact may be terminated at any time by the unanimous agreement of the signatory States. In the event of such termination, all rights established under it shall continue unimpaired.

ARTICLE XI. This compact shall become binding and obligatory when it shall have been approved by the legislature of each of the signatory States and by the Congress of the United States. Notice of approval by the legislature shall be given by the governor of each signatory State to the governors of the other signatory States and to the President of the United States, and the President of the United States is requested to give notice to the governors of the signatory States of approval by the Congress of the United States.

In witness whereof the commissioners have signed this compact in a single original, which shall be deposited in the archives of the Department of State of the United States of

America and of which a duly certified copy shall be forwarded to the governor of each of the signatory States.

Done at the city of Santa Fe, N. Mex., this 24th day of November, A. D. 1922.

W. S. NORVIEL,
W. F. McCLURE,
DELPH E. CARPENTER,
J. G. SCRUGHAM,
STEPHEN B. DAVIS, JR.,
R. E. CALDWELL,
FRANK C. EMERSON.

Approved:

HERBERT HOOVER.

That by the terms of said compact it was to be binding when it had been ratified and approved by the legislatures of the several States and by the Congress of the United States. The States of California, Colorado, Nevada, New Mexico, Utah and Wyoming have ratified said compact. The supplementary compact agreed to be adopted between the States of California, Nevada and Arizona was never negotiated or signed, and the State of Arizona has not ratified said Colorado River compact.

(d) That on December 21, 1928, an act was passed by the Congress of the United States known as the Boulder Canyon Project Act, which was and is in words and figures as follows, to-wit:

BOULDER CANYON PROJECT ACT

(Public—No. 642—70th Congress)
(H. R. 5773)

An act to provide for the construction of works for the protection and development of the Colorado River Basin, for the approval of the Colorado River compact, and for other purposes.

BE IT ENACTED BY THE SENATE AND HOUSE OF REPRESENTATIVES OF THE UNITED STATES OF AMERICA IN CONGRESS ASSEMBLED, That for the purpose of controlling the floods, improving navigation and regulating the flow of the Colorado River, providing for storage and for the delivery of the stored waters thereof for reclamation of public lands and other beneficial uses exclusively within the United States, and for the generation of electrical energy as a means of making the project herein authorized a self-supporting and financially solvent undertaking, the Secretary of the Interior, subject to the terms of the Colorado River compact, hereinafter mentioned, is hereby authorized to construct, operate, and maintain a dam and incidental works in the main stream of the Colorado River at Black Canyon or Boulder Canyon adequate to create a storage reservoir of a capacity of not less than twenty million acre-feet of water and a main canal

and appurtenant structures located entirely within the United States connecting the Laguna Dam, or other suitable diversion dam, which the Secretary of the Interior is hereby authorized to construct if deemed necessary or advisable by him upon engineering or economic considerations, with the Imperial and Coachella Valleys in California, the expenditures for said main canal and appurtenant structures to be reimbursable, as provided in the reclamation law, and shall not be paid out of revenues derived from the sale or disposal of water power or electric energy at the dam authorized to be constructed at said Black Canyon or Boulder Canyon, or for water for potable purposes outside of the Imperial and Coachella Valleys: PROVIDED, HOWEVER, That no charge shall be made for water or for the use, storage, or delivery of water for irrigation or water for potable purposes in the Imperial or Coachella Valleys; also to construct and equip, operate, and maintain at or near said dam, or cause to be constructed, a complete plant and incidental structures suitable for the fullest economic development of electrical energy from the water discharged from said reservoir; and to acquire by proceedings in eminent domain, or otherwise, all lands, rights of way, and other property necessary for said purposes.

Sec. 2 (a) There is hereby established a special fund, to be known as the "Colorado River Dam fund" (Hereinafter referred to as the "fund"), and to be available, as hereafter provided, only for carrying out the provisions of this act. All revenues received in carrying out the provisions of this act shall be paid into and expenditures shall be made out of the fund, under the direction of the Secretary of the Interior.

(b) The Secretary of the Treasury is authorized to advance to the fund, from time to time and within the appropriations therefor, such amounts as the Secretary of the Interior deems necessary for carrying out the provisions of this act, except that the aggregate amount of such advances shall not exceed the sum of $165,000,000. Of this amount the sum of $25,000,000 shall be allocated to flood control and shall be repaid to the United States out of 62½ per centum of revenues, if any, in excess of the amount necessary to meet periodical payments during the period of amortization, as provided in section 4 of this act. If said sum of $25,000,000 is not repaid in full during the period of amortization, then 62½ per centum of all net revenues shall be applied to payment of the remainder. Interest at the rate of 4 per centum per annum accruing during the year upon the

amounts so advanced and remaining unpaid shall be paid annually out of the fund, except as herein otherwise provided.

(c) Moneys in the fund advanced under subdivision (b) shall be available only for expenditures for construction and the payment of interest during construction, upon the amounts so advanced. No expenditures out of the fund shall be made for operation and maintenance except from appropriations therefor.

(d) The Secretary of the Treasury shall charge the fund as of June 30 in each year with such amount as may be necessary for the payment of interest on advances made under subdivision (b) at the rate of 4 per centum per annum accrued during the year upon the amounts so advanced and remaining unpaid, except that if the fund is insufficient to meet the payment of interest the Secretary of the Treasury may, in his discretion, defer any part of such payment, and the amount so deferred shall bear interest at the rate of 4 per centum per annum until paid.

(e) The Secretary of the Interior shall certify to the Secretary of the Treasury, at the close of each fiscal year, the amount of money in the fund in excess of the amount necessary for construction, operation, and maintenance, and payment of interest. Upon

receipt of each such certificate the Secretary of the Treasury is authorized and directed to charge the fund with the amount so certified as repayment of the advances made under subdivision (b), which amount shall be covered into the Treasury to the credit of miscellaneous receipts.

Sec. 3. There is hereby authorized to be appropriated from time to time, out of any money in the Treasury not otherwise appropriated, such sums of money as may be necessary to carry out the purposes of this act, not exceeding in the aggregate $165,000,000.

Sec. 4 (a) This act shall not take effect and no authority shall be exercised hereunder and no work shall be begun and no moneys expended on or in connection with the works or structures provided for in this act, and no water rights shall be claimed or initiated hereunder, and no steps shall be taken by the United States or by others to initiate or perfect any claims to the use of water pertinent to such work or structures unless and until (1) the States of Arizona, California, Colorado, Nevada, New Mexico, Utah and Wyoming shall have ratified the Colorado River Compact, mentioned in section 13 hereof, and the President by public proclamation shall have so declared, or (2) if said States fail to

ratify the said compact within six months from the date of the passage of this act then, until six of said States, including the State of California, shall ratify said compact and shall consent to waive the provisions of the first paragraph of Article XI of said compact, which makes the same binding and obligatory only when approved by each of the seven States signatory thereto, and shall have approved said compact without conditions, save that of such six-State approval, and the President by public proclamation shall have so declared, and, further, until the State of California, by act of its legislature, shall agree irrevocably and unconditionally with the United States and for the benefit of the States of Arizona, Colorado, Nevada, New Mexico, Utah and Wyoming, as an express covenant and in consideration of the passage of this act, that the aggregate annual consumptive use (diversions less returns to the river) of water of and from the Colorado River for use in the State of California, including all uses under contracts made under the provisions of this act and all water necessary for the supply of any rights which may now exist, shall not exceed 4,400,000 acre-feet of the waters apportioned to the lower basin States by paragraph (a) of Article III of the Colorado River Compact, plus not more than one-half of any ex-

cess or surplus waters unapportioned by said compact, such uses always to be subject to the terms of said compact.

The States of Arizona, California and Nevada are authorized to enter into an agreement which shall provide (1) that of the the 7,500,000 acre-feet annually apportioned to the lower basin by paragraph (a) of Article III of the Colorado River Compact, there shall be apportioned to the State of Nevada 300,000 acre-feet and to the State of Arizona 2,800,000 acre-feet for exclusive beneficial consumptive use in perpetuity, and (2) that the State of Arizona may annually use one-half of the excess or surplus waters unapportioned by the Colorado River Compact, and (3) that the State of Arizona shall have the exclusive beneficial consumptive use of the Gila River and its tributaries within the boundaries of said State, and (4) that the waters of the Gila River and its tributaries, except return flow after the same enters the Colorado River, shall never be subject to any diminution whatever by any allowance of water which may be made by treaty or otherwise to the United States of Mexico but if, as provided in paragraph (c) of Article III of the Colorado River Compact, it shall become necessary to supply water to the United States of Mexico from waters over and above the quantities which are

surplus as defined by said compact, then the State of California shall and will mutually agree with the State of Arizona to supply, out of the main stream of the Colorado River one-half of any deficiency which must be supplied to Mexico by the lower basin, and (5) that the State of California shall and will further mutually agree with the States of Arizona and Nevada that none of said three States shall withhold water and none shall require the delivery of water, which cannot reasonably be applied to domestic and agricultural uses, and (6) that all of the provisions of said tri-state agreement shall be subject in all particulars to the provisions of the Colorado River Compact, and (7) said agreement to take effect upon the ratification of the Colorado River Compact by Arizona, California and Nevada.

(b) Before any money is appropriated for the construction of said dam or power plant, or any construction work done or contracted for, the Secretary of the Interior shall make provisions for revenues by contract, in accordance with the provisions of this act, adequate in his judgment to insure payment of all expenses of operation and maintenance of said works incurred by the United States and the repayment, within fifty years from the date of the completion of said works, of all amounts advanced to the fund under sub-

division (b) of section 2 for such works, together with interest thereon made reimbursable under this act.

Before any money is appropriated for the construction of said main canal and appurtenant structures to connect the Laguna Dam with the Imperial and Coachella Valleys in California, or any construction work is done upon said canal or contracted for, the Secretary of the Interior shall make provision for revenues, by contract or otherwise, adequate in his judgment to insure payment of all expenses of construction, operation, and maintenance of said main canal and appurtenant structures in the manner provided in the reclamation law.

If during the period of amortization the Secretary of the Interior shall receive revenues in excess of the amount necessary to meet the periodical payments to the United States as provided in the contract, or contracts, executed under this act, then immediately after the settlement of such periodical payments, he shall pay to the State of Arizona 18¾ per centum of such excess revenues and to the State of Nevada 18¾ per centum of such excess revenues.

Sec. 5. That the Secretary of Interior is hereby authorized, under such general reg-

ulations as he may prescribe, to contract for the storage of water in said reservoir and for the delivery thereof to such points on the river and on said canal as may be agreed upon, for irrigation and domestic uses, and generation of electrical energy and delivery at the switchboard to States, municipal corporations, political subdivisions, and private corporations of electrical energy generated at said dam, upon charges that will provide revenue which, in addition to other revenue accruing under the reclamation law and under this act, will in his judgment cover all expenses of operation and maintenance incurred by the United States on account of works constructed under this act and the payments to the United States under subdivision (b) of section 4. Contracts respecting water for irrigation and domestic uses shall be for permanent service and shall conform to paragraph (a) of section 4 of this act. No person shall have or be entitled to have the use for any purpose of water stored as aforesaid except by contract made as herein stated.

After the repayments to the United States of all moneys advanced with interest, charges shall be on such basis and the revenues derived therefrom shall be kept in a separate fund to be expended within the Colo-

rado River Basin as may hereafter be prescribed by the Congress.

General and uniform regulations shall be prescribed by the said Secretary for the awarding of contracts for the sale and delivery of electrical energy, and for renewals under subdivision (b) of this section, and in making such contracts the following shall govern:

(a) No contract for electrical energy or for generation of electrical energy shall be of longer duration than fifty years from the date at which such energy is ready for delivery.

Contracts made pursuant to subdivision (a) of this section shall be made with a view to obtaining reasonable returns and shall contain provisions whereby at the end of fifteen years from the date of their execution and every ten years thereafter, there shall be readjustment of the contract, upon the demand of either party thereto, either upward or downward as to price, as the Secretary of the Interior may find to be justified by competitive conditions at distributing points or competitive centers, and with provisions under which disputes or disagreements as to interpretation or performance of such contract shall be determined either by arbitration or

court proceedings, the Secretary of the Interior being authorized to act for the United States in such readjustments or proceedings.

(b) The holder of any contract for electrical energy not in default thereunder shall be entitled to a renewal thereof upon such terms and conditions as may be authorized or required under the then existing laws and regulations, unless the property of such holder dependent for its usefulness on a continuation of the contract be purchased or acquired and such holder be compensated for damages to its property, used and useful in the transmission and distribution of such electrical energy and not taken, resulting from the termination of the supply.

(c) Contracts for the use of water and necessary privileges for the generation and distribution of hydroelectric energy or for the sale and delivery of electrical energy shall be made with responsible applicants therefor who will pay the price fixed by the said Secretary with a view to meeting the revenue requirements herein provided for. In case of conflicting applications, if any, such conflicts shall be resolved by the said Secretary, after hearing, with due regard to the public interest, and in conformity with the policy expressed in the Federal water power act as to con-

flicting applications for permits and licenses, except that preference to applicants for the use of water and appurtenant works and privileges necessary for the generation and distribution of hydroelectric energy, or for delivery at the switchboard of a hydroelectric plant, shall be given, first, to a State for the generation or purchase of electric energy for use in the State, and the States of Arizona, California and Nevada shall be given equal opportunity as such applicants.

The rights covered by such preference shall be contracted for by such State within six months after notice by the Secretary of the Interior and to be paid for on the same terms and conditions as may be provided in other similar contracts made by said Secretary: PROVIDED, HOWEVER, That no application of a State or a political subdivision for an allocation of water for power purposes or of electrical energy shall be denied or another application in conflict therewith be granted on the ground that the bond issue of such State or political subdivision, necessary to enable the applicant to utilize such water and appurtenant works and privileges necessary for the generation and distribution of hydroelectric energy or the electrical energy applied for, has not been authorized or marketed, until after a reasonable time, to be determined

by said Secretary, has been given to such applicant to have such bond issue authorized and marketed.

(d) Any agency receiving a contract for electrical energy equivalent to one hundred thousand firm horsepower, or more, may, when deemed feasible by the said Secretary, from engineering and economic considerations and under general regulations prescribed by him, be required to permit any other agency having contracts hereunder for less than the equivalent of twenty-five thousand firm horsepower, upon application to the Secretary of the Interior made within sixty days from the execution of the contract of the agency the use of whose transmission line is applied for, to participate in the benefits and use of any main transmission line constructed or to be constructed by the former for carrying such energy (not exceeding, however, one-fourth the capacity of such line), upon payment by such other agencies of a reasonable share of the cost of construction, operation, and maintenance thereof.

The use is hereby authorized of such public and reserved lands of the United States as may be necessary or convenient for the construction, operation, and maintenance of

main transmission lines to transmit said electrical energy.

Sec. 6. That the dam and reservoir provided for by section 1 hereof shall be used: First, for river regulation, improvement of navigation, and flood control; second, for irrigation and domestic uses and satisfaction of present perfected rights in pursuance of Article VIII of said Colorado River Compact; and third, for power. The title to said dam, reservoir, plant, and incidental works shall forever remain in the United States, and the United States shall, until otherwise provided by Congress, control, manage, and operate the same, except as herein otherwise provided: PROVIDED, HOWEVER, That the Secretary of the Interior may, in his discretion, enter into contracts of lease of a unit or units of any Government-built plant, with right to generate electrical energy, or, alternately, to enter into contracts of lease for the use of water for the generation of electrical energy as herein provided, in either of which events the provisions of section 5 of this act relating to revenue, term, renewals, determination of conflicting applications, and joint use of transmission lines under contracts for the sale of electrical energy, shall apply.

The Secretary of the Interior shall pre-

scribe and enforce rules and regulations, conforming with the requirements of the Federal water power act, so far as applicable, respecting maintenance of works in condition of repair adequate for their efficient operation, maintenance of a system of accounting, control of rates and service in the absence of State regulation or interstate agreement, valuation for rate-making purposes, transfers of contracts, contracts extending beyond the lease period, expropriation of excessive profits, recapture and or emergency use by the United States of property of lessees, and penalties for enforcing regulations made under this act or penalizing failure to comply with such regulations or with the provisions of this act. He shall also conform with other provisions of the Federal water power act and of the rules and regulations of the Federal Power Commission, which have been devised or which may be hereafter devised, for the protection of the investor and consumer.

The Federal Power Commission is hereby directed not to issue or approve any permits or licenses under said Federal water power act upon or affecting the Colorado River or any of its tributaries, except the Gila River, in the States of Colorado, Wyoming, Utah, New Mexico, Nevada, Arizona and California until this

act shall become effective as provided in section 4 herein.

Sec. 7. That the Secretary of the Interior may, in his discretion, when repayments to the United States of all money advanced, with interest, reimbursable hereunder, shall have been made, transfer the title to said canal and appurtenant structures, except the Laguna Dam, and the main canal and appurtenant structures down to and including Syphon Drop, to the districts or other agencies of the United States having a beneficial interest therein in proportion to their respective capital investments under such form of organization as may be acceptable to him. The said districts or other agencies shall have the privilege at any time of utilizing by contract or otherwise such power possibilities as may exist upon said canal, in proportion to their respective contributions or obligations toward the capital cost of said canal and appurtenant structures from and including the diversion works to the point where each respective power plant may be located. The net proceeds from any power development on said canal shall be paid into the fund and credited to said districts or other agencies on their said contracts, in proportion to their rights to develop power, until the districts or other agencies using said canal shall have paid thereby

and under any contract or otherwise an amount of money equivalent to the operation and maintenance expense and cost of construction thereof.

Sec. 8. (a) The United States, its permittees, licensees, and contractees, and all users and appropriators of water stored, diverted, carried, and-or distributed by the reservoir, canals, and other works herein authorized, shall observe and be subject to and controlled by said Colorado River Compact in the construction, management, and operation of said reservoir, canals and other works, and the storage, diversion, delivery, and use of water for the generation of power, irrigation, and other purposes, anything in this act to the contrary notwithstanding, and all permits, licenses, and contracts shall so provide.

(b) Also the United States, in constructing, managing, and operating the dam, reservoir, canals, and other works herein authorized, including the appropriation, delivery, and use of water for the generation of power, irrigation, or other uses, and all users of water thus delivered, and all users and appropriators of waters stored by said reservoir and-or carried by said canal, including all permittees and licensees of the United States or any of its agencies, shall observe and be subject to and controlled, anything to the contrary herein

notwithstanding, by the terms of such compact, if any, between the States of Arizona, California and Nevada, or any two thereof, for the equitable division of the benefits, including power, arising from the use of water accruing to said States, subsidiary to and consistent with said Colorado River Compact, which may be negotiated and approved by said States and to which Congress shall give its consent and approval on or before January 1, 1929; and the terms of any such compact concluded between said States and approved and consented to by Congress after said date: PROVIDED, That in the latter case such compact shall be subject to all contracts, if any, made by the Secretary of the Interior under section 5 hereof prior to the date of such approval and consent by Congress.

Sec. 9. That all lands of the United States found by the Secretary of the Interior to be practicable of irrigation and reclamation by the irrigation works authorized herein shall be withdrawn from public entry. Thereafter, at the direction of the Secretary of the Interior such lands shall be opened for entry, in tracts varying in size but not exceeding one hundred and sixty acres, as may be determined by the Secretary of the Interior, in accordance with the provisions of the reclamation law, and any such entryman shall pay an equitable share in

accordance with the benefits received, as determined by the said Secretary, of the construction cost of said canal and appurtenant structures; said payments to be made in such installments and at such times as may be specified by the Secretary of the Interior, in accordance with the provisions of the said reclamation law, and shall constitute revenue from said project and be covered into the fund herein provided for; PROVIDED, That all persons who have served in the United States Army, Navy or Marine Corps during the war with Germany, the war with Spain, or in the suppression of the insurrection in the Philippines, and who have been honorably separated or discharged therefrom or placed in the Regular Army or Navy Reserve, shall have the exclusive preference right for a period of three months to enter said lands, subject, however, to the provisions of subsection (c) of section 4, Act of December 5, 1924 (Forty-third Statutes at Large, p. 702); and also, so far as practicable, preference shall be given to said persons in all construction work authorized by this act: PROVIDED, FURTHER, That in the event such an entry shall be relinquished at any time prior to actual residence upon the land by the entryman for not less than one year, lands so relinquished shall not be subject to entry for a period of sixty days after the

filing and notation of the relinquishment in the local land office, and after the expiration of said sixty-day period such lands shall be open to entry, subject to the preference in this section provided.

Sec. 10. That nothing in this act shall be construed as modifying in any manner the existing contract, dated October 23, 1918, between the United States and the Imperial Irrigation District, providing for a connection with Laguna Dam; but the Secretary of the Interior is authorized to enter into contract or contracts with the said district or other districts, persons, or agencies for the construction, in accordance with this act, of said canal and appurtenant structures, and also for the operation and maintenance thereof, with the consent of the other users.

Sec. 11. That the Secretary of the Interior is hereby authorized to make such studies, surveys, investigations, and do such engineering as may be necessary to determine the lands in the State of Arizona that should be embraced within the boundaries of a reclamation project, heretofore commonly known and hereafter to be known as the Parker-Gila Valley Reclamation Project, and to recommend the most practicable and feasible method of irrigating lands within said project, or units thereof, and the cost of the same; and the ap-

propriation of such sums of money as may be necessary for the aforesaid purposes from time to time is hereby authorized. The Secretary shall report to Congress as soon as practicable, and not later than December 10, 1931, his findings, conclusions and recommendations regarding such project.

Sec. 12. "Political subdivision" or "political subdivisions" as used in this act shall be understood to include any State, irrigation or other district, municipality, or other governmental organization.

"Reclamation law" as used in this act shall be understood to mean that certain act of the Congress of the United States approved June 17, 1902, entitled "An act appropriating the receipts from the sale and disposal of public land in certain States and Territories to the construction of irrigation works for the reclamation of arid lands," and the acts amendatory thereof and supplemental thereto.

"Maintenance" as used herein shall be deemed to include in each instance provision for keeping the works in good operating condition.

"The Federal Water Power Act" as used in this act, shall be understood to mean that certain act of Congress of the United States as approved June 10, 1920, entitled "An act to

create a Federal Power Commission; to provide for the improvement of navigation; the development of water power; the use of the public lands in relation thereto; and to repeal section 18 of the river and harbor appropriation act, approved August 8, 1917, and for other purposes," and the acts amendatory thereof and supplemental thereto.

"Domestic" whenever employed in this act shall include water uses defined as "domestic" in said Colorado River Compact.

Sec. 13. (a) The Colorado River Compact signed at Santa Fe, New Mexico, November 24, 1922, pursuant to act of Congress approved August 19, 1921, entitled "An act to permit a compact or agreement between the States of Arizona, California, Colorado, Nevada, New Mexico, Utah, and Wyoming respecting the disposition and apportionment of the waters of the Colorado River, and for other purposes," is hereby approved by the Congress of the United States, and the provisions of the first paragraph of Article XI of the said Colorado River Compact, making said compact binding and obligatory when it shall have been approved by the legislature of each of the signatory States, are hereby waived, and this approval shall become effective when the State of California and at least five of the other States mentioned, shall have

approved or may hereafter approve said compact as aforesaid and shall consent to such waiver, as herein provided.

(b) The rights of the United States in and to waters of the Colorado River and its tributaries howsoever claimed or acquired, as well as the rights of those claiming under the United States, shall be subject to and controlled by said Colorado River Compact.

(c) Also all patents, grants, contracts, concessions, leases, permits, licenses, rights of way, or other privileges from the United States or under its authority, necessary or convenient for the use of waters of the Colorado River or its tributaries, or for the generation or transmission of electrical energy generated by means of the waters of said river or its tributaries, whether under this act, the Federal water power act, or otherwise, shall be upon the express condition and with the express condition and with the express covenant that the rights of the recipients or holders thereof to waters of the river or its tributaries, for the use of which the same are necessary, convenient or incidental, and the use of the same shall likewise be subject to and controlled by said Colorado River Compact.

(d) The conditions and covenants referred to herein shall be deemed to run with

the land and the right, interest, or privilege therein and water right, and shall attach as a matter of law, whether set out or referred to in the instrument evidencing any such patent, grant, contract, concession, lease, permit, license, right of way, or other privilege from the United States or under its authority, or not, and shall be deemed to be for the benefit of and be available to the States of Arizona, California, Colorado, Nevada, New Mexico, Utah, and Wyoming, and the users of water therein or thereunder, by way of suit, defense, or otherwise, in any litigation respecting the waters of the Colorado River or its tributaries.

Sec. 14. This act shall be deemed a supplement to the reclamation law, which said reclamation law shall govern the construction, operation and management of the works herein authorized, except as otherwise herein provided.

Sec. 15. The Secretary of the Interior is authorized and directed to make investigation and public reports of the feasibility of projects for irrigation, generation of electric power, and other purposes in the States of Arizona, Nevada, Colorado, New Mexico, Utah, and Wyoming for the purpose of making such information available to said States and to the Congress, and of formulating a comprehensive scheme of control and the improvement

and utilization of the water of the Colorado River and its tributaries. The sum of $250,000 is hereby authorized to be appropriated from said Colorado River Dam fund, created by section 2 of this act, for such purposes.

Sec. 16. In furtherance of any comprehensive plan formulated hereafter for the control, improvement, and utilization of the resources of the Colorado River system and to the end that the project authorized by this act may constitute and be administered as a unit in such control, improvement, and utilization, any commission or commissioner duly authorized under the laws of any ratifying State in that behalf shall have the right to act in an advisory capacity to and in co-operation with the Secretary of the Interior in the exercise of any authority under the provisions of sections 4, 5 and 14 of this act, and shall have at all times access to records of all Federal agencies empowered to act under said sections, and shall be entitled to have copies of said records on request.

Sec. 17. Claims of the United States arising out of any contract authorized by this act shall have priority over all others, secured or unsecured.

Sec. 18. Nothing herein shall be construed as interfering with such rights as the States

now have either to the waters within their borders or to adopt such policies and enact such laws as they may deem necessary with respect to the appropriation, control, and use of waters within their borders, except as modified by the Colorado River Compact or other interstate agreement.

Sec. 19. That the consent of Congress is hereby given to the States of Arizona, California, Colorado, Nevada, New Mexico, Utah and Wyoming to negotiate and enter into compacts or agreements, supplemental to and in conformity with the Colorado River Compact and consistent with this act for a comprehensive plan for the development of the Colorado River and providing for the storage, diversion and use of the waters of said river. Any such compact or agreement may provide for the construction of dams, headworks, and other diversion works or structures for flood control, reclamation, improvement of navigation, diversion of water, or other purposes and-or the construction of power houses or other structures for the purpose of the development of water power and the financing of the same; and for such purposes may authorize the creation of interstate commissions and-or the creation of corporations, authorities, or other instrumentalities.

(a) Such consent is given upon condition

that a representative of the United States, to be appointed by the President, shall participate in the negotiations and shall make report to Congress of the proceedings and of any compact or agreement entered into.

(b) No such compact or agreement shall be binding or obligatory upon any of such States unless and until it has been approved by the legislature of each of such States and by the Congress of the United States.

Sec. 20. Nothing in this act shall be construed as a denial or recognition of any rights, if any, in Mexico to the use of the waters of the Colorado River system.

Sec. 21. That the short title of this act shall be "Boulder Canyon project act."

Approved, December 21, 1928.

(e) That subsequent to the passage of said Boulder Canyon project act the States of California, Colorado, Nevada, New Mexico, Utah and Wyoming waived the provisions of the first paragraph of Article XI of said compact which makes the same binding and obligatory only when approved by the legislatures of the several states signatory thereto, and ratified the Colorado River Compact and agreed that the same should be binding upon its ratification by six States, including the State of California. By said Boulder Canyon project act the Congress of the United States ratified said compact.

(f) That following the enactment of said Boulder Canyon project act and pursuant thereto the State of California by Chapter 16 of the Statutes and Amendments to the Codes of California, 1929, ratified said compact and agreed that it should become binding upon the ratification by five other States, and in addition agreed irrevocably and unconditionally with the United States and for the benefit of the States of Arizona, Colorado, Nevada, New Mexico, Utah and Wyoming, as an express covenant and in consideration of the said Boulder Canyon project act, that the aggregate consumptive use (diversions less returns to the river) of water of and from the Colorado River for use in the State of California, including all uses under contracts made under the provisions of said Boulder Canyon project act and all water necessary for the supply of any rights which might then exist, shall not exceed 4,400,000 acre-feet per annum of the waters apportioned to the lower basin States by Paragraph (a) of Article III of the said Colorado River Compact, plus not more than one-half of any excess or surplus waters unapportioned by said compact, such uses always to be subject to the terms of said compact, which said Chapter 16 of the laws of California of 1929, was and is in words and figures as follows, to-wit:

CHAPTER 16

An Act to limit the use by California of waters of the Colorado River in compliance

with the act of Congress known as the "Boulder Canyon project Act," approved December 21, 1928, in the event the Colorado River Compact is not approved by all of the States signatory thereto. (Approved by the Governor March 4, 1929. In effect August 14, 1929.)

THE PEOPLE OF THE STATE OF CALIFORNIA DO ENACT AS FOLLOWS:

Section 1. In the event the Colorado River Compact signed at Santa Fe, New Mexico, November 24, 1922, and approved by and set out at length in that certain act entitled "An act to ratify and approve the Colorado River Compact signed at Santa Fe, New Mexico, November 24, 1922, to repeal conflicting acts and resolutions and directing that notice be given by the governor of such ratifications and approval" approved January 10, 1929, (Statutes 1929 Chapter 1) is not approved within six months from the date of the passage of that certain act of the Congress of the United States known as the "Boulder Canyon project act," approved December 21, 1928, by the legislatures of each of the seven states signatory thereto, as provided by article eleven of the said Colorado River Compact, then when six of said states, including California, shall have ratified and approved said compact, and shall have consented to waive the provisions of the first paragraph of article eleven of said com-

pact which makes the same binding and obligatory when approved by each of the states signatory thereto, and shall have approved said compact without conditions save that of such six states approval and the President by public proclamation shall have so declared as provided by said "Boulder Canyon project act," the State of California as of the date of such proclamation agrees irrevocably and unconditionally with the United States and for the benefit of the States of Arizona, Colorado, Nevada, New Mexico, Utah and Wyoming as an express covenant and in consideration of the passage of the said "Boulder Canyon project act" that the aggregate annual consumptive use (diversions less returns to the river) of water of and from the Colorado River for use in the State of California, including all uses under contracts made under the provisions of said "Boulder Canyon project act" and all water necessary for the supply of any right which may not exist, shall not exceed four million four hundred thousand acre-feet of the waters apportioned to the lower basin states by paragraph "a" of article three of the said Colorado River Compact, plus not more than one-half of any excess or surplus waters unapportioned by said compact such uses always to be subject to the terms of said compact.

Sec. 2. By this act the State of California intends to comply with the conditions respecting limitation on the use of water as specified in subdivision 2 of section 4 (a) of the said "Boulder Canyon project act" and this act shall be so construed."

(g) That thereafter and on the 25th day of June, 1929, the President of the United States by public proclamation declared the Boulder Canyon project act effective.

(h) That thereafter Honorable Ray Lyman Wilbur, the then Secretary of the Interior, of the United States, promulgated certain regulations for the delivery of water, on April 23, 1930, which as amended by him on September 28, 1931, were and are in words and figures as follows, to-wit:

GENERAL REGULATIONS

Contracts for the storage of water in Boulder Canyon Reservoir, Boulder Canyon project, and the delivery thereof.

1. No person shall have or be entitled to have the use for any purpose of the water stored in Boulder Canyon Reservoir except by contract made in pursuance of these regulations. All contracts for delivery of water shall be subject to all the terms and provisions of the Colorado River Compact and of the Boulder Canyon project act.

2. The right is reserved to amend or ex-

tend these regulations from time to time consistently with said compact and the laws of Congress, as the public need may require.

3. Storage water in Boulder Canyon Reservoir will be delivered upon such terms and conditions as the Secretary may fix from time to time by regulations and contracts thereunder. Water so contracted for may be delivered at such points on the river as may be agreed upon for irrigation and domestic uses.

4. Contracts respecting water for irrigation and domestic uses shall be for permanent service, and shall conform to paragraph (a) of section 4 of the Boulder Canyon project act.

5. No charge shall be made for water or for the use, storage, or delivery of water for irrigation or for water for potable purposes in the Imperial and Coachella Valleys. Charges otherwise shall be fixed by regulation from time to time. Where water is permitted by the Secretary to be taken from the Colorado River from the reservoir above the Hoover Dam, the utilization of the power plant will be impaired to that extent, and the right is reserved to make a higher charge for water taken above the dam than if delivery is made below the dam.

6. Subject to the provisions of article 7 of these regulations, deliveries of water to users

in California shall be in accordance with the following recommendations of the state division of water resources:

"The waters of the Colorado River available for use within the State of California under the Colorado River Compact and the Boulder Canyon project act shall be apportioned to the respective interests below named and in amounts and with priorities therein named and set forth as follows:

"Section 1. A first priority to Palo Verde Irrigation District for beneficial use exclusively upon lands in said district as it now exists and upon lands between said district and the Colorado River, aggregating (within and without said district) a gross area of 104,500 acres, such waters as may be required by said lands.

"Section 2. A second priority to Yuma project of United States Bureau of Reclamation for beneficial use upon not exceeding a gross area of 25,000 acres of land located in said project in California, such waters as may be required by said lands.

"Section 3. A third priority (a) to Imperial Irrigation District and other lands under or that will be served from the All-American Canal in Imperial and Coachella Valleys, and (b) to Palo Verde Irrigation District for

use exclusively on 16,000 acres in that area known as the Lower Palo Verde Mesa, adjacent to Palo Verde Irrigation District, for beneficial consumptive use, 3,850,000 acre-feet of water per annum less the beneficial consumptive use under the priorities designated in sections 1 and 2 above. The rights designated (a) and (b) in this section are equal in priority. The total beneficial consumptive use under priorities stated in sections 1, 2 and 3 of this article shall not exceed 3,850,000 acre-feet of water per annum.

"Section 4. A fourth priority to the Metropolitan Water District of Southern California and-or the City of Los Angeles, for beneficial consumptive use, by themselves and-or others, on the coastal plain of Southern California, 550,000 acre-feet of water per annum.

"Section 5. A fifth priority (a) to the Metropolitan Water District of Southern California, and-or the City of Los Angeles, for beneficial consumptive use, by themselves and-or others, on the coastal plain of Southern California, 550,000 acre-feet of water per annum and (b) to the City of San Diego and-or County of San Diego, for beneficial consumptive use, 112,000 acre-feet of water per annum. The rights designated (a) and (b) in this section are equal priority.

"Section 6. A sixth priority (a) to Imperial Irrigation District and other lands under or that will be served from the All-American Canal in Imperial and Coachella Valleys, and (b) to Palo Verde Irrigation District for use exclusively on 16,000 acres in that area known as the Lower Palo Verde Mesa, adjacent to Palo Verde Irrigation District, for beneficial consumptive use, 300,000 acre-feet of water per annum. The rights designated (a) and (b) in this section are equal in priority.

"Section 7. A seventh priority of all remaining water available for use within California, for agricultural use in the Colorado River Basin in California, as said basin is designated on map No. 23000 of the Department of the Interior, Bureau of Reclamation.

"Section 8. So far as the rights of the allottees named above are concerned, the Metropolitan Water District of Southern California and-or the City of Los Angeles shall have the exclusive right to withdraw and divert into its aqueduct any water in Boulder Canyon Reservoir accumulated to the individual credit of said district and-or said city (not exceeding at any one time 4,750,000 acre-feet in the aggregate) by reason of reduced diversions by said district and-or said city; provided, that accumulations shall be subject to such condi-

tions as to accumulation, retention, release, and withdrawal as the Secretary of the Interior may from time to time prescribe in his discretion, and his determination thereof shall be final; provided further, that the United States of America reserves the right to make similar arrangements with users in other States without distinction in priority, and to determine the correlative relations between said district and-or said city and such users resulting therefrom.

"Section 9. In addition, so far as the rights of the allottees named above are concerned, the City of San Diego and-or County of San Diego shall have the exclusive right to withdraw and divert into an aqueduct any water in Boulder Canyon Reservoir accumulated to the individual credit of said city and-or said county (not exceeding at any one time 250,000 acre-feet in the aggregate) by reason of reduced diversions by said city and-or said county; provided, that accumulations shall be subject to such conditions as to accumulation, retention, release and withdrawal as the Secretary of the Interior may from time to time prescribe in his discretion, and his determination thereof shall be final; provided further, that the United States of America reserves the right to make similar arrangements with users in other States without distinction in

priority, and to determine the correlative relations between the said city and-or said county and such users resulting therefrom.

"Section 10. In no event shall the amounts allotted in this agreement to the Metropolitan Water District of Southern California and-or the City of Los Angeles be increased on account of inclusions of a supply for both said district and said city, and either or both may use said apportionments as may be agreed by and between said district and said city.

"Section 11. In no event shall the amounts allotted in this agreement to the City of San Diego and-or to the County of San Diego be increased on account of inclusion of a supply for both said city and said county, and either or both may use said apportionments as may be agreed by and between said city and said county.

"Section 12. The priorities hereinbefore set forth shall be in no wise affected by the relatives dates of water contracts executed by the Secretary of the Interior with the various parties."

7. The Secretary reserves the right to contract with any of the allottees above named in accordance with the above stated recommendation, or, in the event that such recommendation as to Palo Verde Irrigation Dis-

trict is superseded by an agreement between all the above allottees or by a final judicial determination, to contract with the Palo Verde Irrigation District in accordance with such agreement or determination; provided, that priorities numbered fourth and fifth in said recommendation shall not thereby be disturbed.

RAY LYMAN WILBUR,
Secretary of the Interior.

September 28, 1931.

That the Honorable Ray Lyman Wilbur, the then Secretary of the Interior of the United States, entered into a contract with the Imperial Irrigation District of California, dated December 1, 1932, and entered into a contract with the Metropolitan Water District of Southern California, dated April 24, 1930, and amended September 28, 1931, and proposes to enter into contracts with the City of San Diego and with the Palo Verde Irrigation District. That it is provided by the contract made by the Secretary of the Interior with the Imperial Irrigation District of California and by the contract made with the Metropolitan Water District of Southern California, that the United States shall, from the waters of the Colorado River, deliver to users thereof in the State of California, in accordance with the aforesaid regulations, a total of 5,362,000 acre-feet of water per annum.

(i) That the compact suggested by the Boul-

der Canyon Project Act to be entered into between the States of California, Nevada and Arizona has not been made.

(j) That your complainant is reliably informed and believes and, therefore, alleges that Honorable Harold L. Ickes, the present Secretary of the Interior of the United States, recognizes the regulations promulgated by his predecessor in office, Honorable Ray Lyman Wilbur, and the contracts made by his predecessor in office, Honorable Ray Lyman Wilbur, as hereinbefore alleged, to be valid and binding upon the United States and the parties thereto and that said Honorable Harold L. Ickes, the present Secretary of the Interior of the United States, proposes to carry out the terms of said contracts and that the State of California, its political subdivisions and public corporations, parties defendant herein, are making preparations to demand the waters therein contracted to be delivered by the Secretary of the Interior and asserting that said contracts are in all respects binding and valid.

(k) That your complainant is reliably informed and believes and, therefore, alleges that certain of the defendant States and the defendant public corporations of the State of California and Honorable Harold L. Ickes, Secretary of the Interior of the United States, are now claiming and asserting that the true meaning and intent of subdivision (b) of Article III of the Colorado River Compact, here-

inabove set out, is that the waters referred to in said subdivision (b) of Article III of said compact have no reference to the Gila River and its tributaries in Arizona and that the said water was not intended by the framers of said compact, nor by said compact, for the benefit of the State of Arizona and that the contracts made by the Secretary of the Interior of the United States for the use of waters of the Colorado River within the State of California to the amount of 5,362,000 acre-feet per annum thereof relate to and include 4,400,000 acre-feet of water allocated by subdivision (a) of Article III of said compact and 962,000 acre-feet per annum of water allocated by subdivision (b) of Article III of said compact and that said defendants are thereby undertaking to give a meaning to subdivision (b) of Article III of said compact different from that intended by the framers and signers thereof and agreed to by them, and attempting to assert a right to appropriate said one million acre-feet of water per annum from the waters of the Colorado River outside of the State of Arizona so as to interfere with the enjoyment by Arizona, and those claiming under it, of rights already perfected and with the right to make additional legal appropriations and enjoy the same. And the State of California refuses to agree to the exclusion of the Gila River from the limitation imposed on the lower basin by the terms of the Colorado River Compact as suggested by the Boulder Canyon

Project Act and asserts that in addition to the waters contracted, it is entitled to appropriate from the Colorado River one half of the surplus or unappropriated waters thereof, and further asserts contrary to and in violation of the true intent of said compact, Boulder Canyon Project Act and Act of the Legislature of said State, as hereinabove alleged, that in computing the amount of such surplus or unappropriated waters the entire flow of the Gila River shall be added to the flow of the Colorado River.

(l) That the true purpose and meaning of said subdivision (b) of Article III of said compact can be determined and established by the testimony of certain persons present at the time the compact was negotiated and signed, as parties thereto, their advisors, agents and attorneys who were present at their negotiations and the signing of said compact, and who alone know the facts relating to the true construction, meaning and intent of said subdivision (b) of Article III of said Colorado River Compact as hereinabove set forth. It is material and necessary for the protection of the rights of the complainant herein that the testimony of Honorable Herbert Hoover of Palo Alto, California, the representative of the United States at and chairman of the Santa Fe conference which framed the Colorado River Compact; the Honorable Thomas E. Campbell, the then Governor of Arizona, of Prescott, Arizona; Honorable W. S. Norviel of Phoenix, Arizona, who

with former Governor Thomas E. Campbell represented the State of Arizona at said conference; the Honorable Delph E. Carpenter, the representative of the State of Colorado at said conference, now of Greeley, Colorado; the Honorable J. G. Scrugham, the representative of the State of Nevada at said conference, now a member of the Congress of the United States; the Honorable R. E. Caldwell, the representative of the State of Utah at said conference, now of Los Angeles, California; the Honorable C. C. Lewis, the assistant Water Commissioner of the State of Arizona and advisor to W. S. Norviel, who was also present at said conference, now of Phoenix, Arizona, and the Honorable Clarence C. Stetson, who was the executive secretary of said conference, now of Bangor, Maine, and each of them, be taken with respect to the matters and facts herein stated in order that the same may be perpetuated and that equity and justice may be done by, to and among the parties hereto; that the witnesses, hereinbefore named, are, complainant is informed and believes, the only persons now living who participated in said conference, the others participating therein being now deceased.

(m) That such testimony will be material in the anticipated cause and causes of action in determining the true meaning and intent of said Colorado River Compact, said Boulder Project Act and the conditions thereby attached to patents, grants, contracts, concessions, leases, permits, licenses,

rights of way and other privileges from the United States and under its authority, and in determining the true purpose and meaning of the limitation of use in the State of California of waters of said Colorado River imposed by said Boulder Canyon Project Act and the act of the legislature of the State of California, herein set out, and the relative and respective rights of each of the parties hereto in and to the waters of said Colorado River and its tributaries and the use thereof and the burdens and restrictions imposed on such use.

V

That at the time of the filing of this bill to perpetuate testimony, no waters are being taken from the Colorado River system under the contracts hereinabove alleged, and no rights of the State of Arizona have as yet been interfered with and it is not possible for the complainant herein to bring the matters and things herein alleged to an immediate judicial determination and it may be years before any waters are taken from said river under said contracts, or the rights of Arizona therein are interfered with, and all the persons with present knowledge of the present facts may not be available as witnesses when a cause of action shall have accrued to the State of Arizona.

VI

That the witnesses hereinbefore named alone know the facts herein stated and will be material and necessary witnesses in the prosecution of litigation,

which this complainant will be compelled to institute in order to safeguard and protect the right of complainant and those claiming under it to the use of the waters of the Colorado River system and to carry out the true meaning and intent of the act of the legislature of the State of California and of the Boulder Canyon Project Act in limiting the use of the waters of the Colorado River system in said State.

VII

That an original bill, heretofore filed by this complainant in this Court, wherein the State of Arizona was complainant against the states defendant herein, reported in 51 Supreme Court Reporter 522, was dismissed by this Court in the following language:

> "The bill is dismissed without prejudice to an application for relief in case the stored water is used in such a way as to interfere with the enjoyment by Arizona, and those claiming under it, of any rights already perfected or with the right of Arizona to make additional legal appropriations and to enjoy the same."

VIII

Complainant has fully and fairly stated the facts now existing, constituting its cause and causes of action hereinafter to accrue, and what it would expect to prove by the witnesses hereinabove enum-

erated, and complainant is advised by its attorneys herein and, therefore, believes and alleges that it has a good cause of action herein and that an examination and perpetuation of the testimony of the witnesses hereinabove named, is necessary for the protection of the rights of the complainant and those claiming under it. That because the cause and causes of action in which the testimony of the said witnesses is desired cannot be brought immediately to judicial inquiry, complainant is greatly in danger of losing the testimony of said witnesses unless the same be taken and perpetuated in this proceeding, pursuant to the usage, practice and custom of this Court.

WHEREFORE, complainant prays that such process, commission, or commissions and subpoenas as may be necessary for the taking of the oral depositions of said witnesses be issued, executed and returned to this Court to the end that the testimony of the witnesses, hereinabove named, may be preserved and perpetuated in this Court in order that complainant and defendants may use the same, as they may be advised in any and all future litigation concerning the waters of the Colorado River between the parties hereto, as may then be proper.

ARTHUR T. LAPRADE,
Attorney General of the State of Arizona, Solicitor for Complainant.

CHARLES A. CARSON, JR.
A. M. CRAWFORD,
Of Counsel.

STATEMENT AS TO JURISDICTION

Section 2 of Article III of the Constitution of the United States provides that the judicial power shall extend to "all cases in law and equity . . ., to controversies between two or more states . . ." and that "in all cases affecting ambassadors, other public ministers and consuls and those in which a State shall be party, the Supreme Court shall have original jurisdiction."

Paragraph 341, Title 28, of the United States Code provides:

> "The Supreme court shall have exclusive jurisdiction of all controversies of a civil nature where a state is a party, except between a state and its citizens or between a state and citizens of another state, or aliens, in which latter cases it shall have original, but not exclusive jurisdiction . . ."

No statute has been found concerning the perpetuation of testimony in the Supreme Court, however, Rule 5 of the Revised Rules of the Supreme Court of the United States, effective July 1, 1928, provides:

5

PRACTICE

"This court considers the former practice of the Courts of King's Bench and of Chancery, in England, as affording outlines for the

practice of this court in matters not covered by its rules or decisions, or the laws of Congress."

Under the foregoing constitutional provision and the foreging statute, the Supreme Court exercises exclusive jurisdiction in controversies between States and hence has jurisdiction in this matter.

On account of the foreging rule we have endeavored to follow the English Chancery practice.

Respectfully submitted.

ARTHUR T. LAPRADE,
Attorney General of the State of Arizona, Solicitor for Complainant.

CHARLES A. CARSON, JR.
A. M. CRAWFORD,
Of Counsel.

FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1933

No.....(Original)

STATE OF ARIZONA

Complainant,

VS.

STATE OF CALIFORNIA, STATE OF COLORADO, STATE OF NEVADA, STATE OF NEW MEXICO, STATE OF UTAH, STATE OF WYOMING, HAROLD L. ICKES, Secretary of the Interior of the United States, PALO VERDE IRRIGATION DISTRICT, a public corporation of the State of California, IMPERIAL IRRIGATION DISTRICT, a public corporation, of the State of California, COACHELLA VALLEY COUNTY WATER DISTRICT, a public corporation of the State of California, METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, a public corporation of the State of California, CITY OF LOS ANGELES, a municipal corporation of the State of California, CITY OF SAN DIEGO, a municipal corporation of the State of California, and COUNTY OF SAN DIEGO, a public corporation of the State of California,

Defendants.

BRIEF OF COMPLAINANT STATE OF ARIZONA IN SUPPORT OF ITS MOTION FOR LEAVE TO FILE BILL TO PERPETUATE TESTIMONY AND IN ANSWER TO BRIEFS FILED IN SUPPORT OF OBJECTIONS THERETO

ARTHUR T. LAPRADE,
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BRIEF OF COMPLAINANT STATE OF ARIZONA IN SUPPORT OF ITS MOTION FOR LEAVE TO FILE BILL TO PERPETUATE TESTIMONY AND IN ANSWER TO BRIEFS FILED IN SUPPORT OF OBJECTIONS THERETO

PRELIMINARY STATEMENT

In the above entitled action the Court on the 20th day of February, 1934, issued its rule directing the above named defendants to show cause why complainant's motion for leave to file its bill to perpetuate testimony should not be granted. The rule was made returnable April 2, 1934.

The defendant states of Colorado, Nevada, New Mexico, Utah and Wyoming have filed their response, interposing no objection to the perpetuation of the testimony sought in this action by complainant, State of Arizona, and merely pray that in the event such tesimony is perpetuated, that they, and each of them, may have the right of cross-examination of the witnesses whose testimony may be taken and the right to object to the introduction of the testimony when it may be offered in evidence.

The complainant State of Arizona has no objection to any prayer made by the States of Colorado, Nevada, New Mexico, Utah and Wyoming, not only as applicable to those States, but as applicable to all of the defendants herein.

The response of defendant Harold L. Ickes to the rule to show cause and the brief filed in support of his response and objections to the perpetuation of testimony, raise three questions:

1. Has this Court jurisdiction in a proper case to entertain an original bill to perpetuate testimony?

2. Is the testimony offered here admissable or competent for any of the purposes suggested?

3. Is this in real effect a suit against the United States?

The return to the rule to show cause and the brief filed in support of their objections to the perpetuation of the testimony, as sought by complainant State of Arizona

filed on behalf of defendants Palo Verde Irrigation District, Imperial Irrigation District, Coachella Valley County Water District, State of California, Metropolitan Water District of Southern California, City of Los Angeles, City of San Diego and County of San Diego, raise the same three questions as raised by the response and brief of defendant Harold L. Ickes.

The only objections made therefore to the filing of the bill and the perpetuation of the testimony, as prayed by complainant, are those raised in the one brief by defendant Harold L. Ickes and in the other joint brief by the above named defendants, all of the State of California and which will hereafter be called, for the sake of brevity, "the California defendants", since in this action they raise the same objections in a joint return and brief.

We find no rule of this Court governing procedure in a proceeding of this nature and the Court has made no order and established no rule since the filing of the returns on behalf of the various defendants.

It, of course, is confidently assumed that the Court would not deny complainant's motion for leave to file its bill to perpetuate testimony without an opportunity first having been given to complainant to be heard upon the objections filed by the California defendants and the defendant Harold L. Ickes to the filing of the bill and the perpetuation of the testimony, but since the Court has adjourned until the 30th of April and no order, or rule as to procedure, can be expected before that date, in order to

save time and expedite the matter it has been thought advisable to file this brief on behalf of complainant State of Arizona now, so that if the Court, after reading the briefs and considering the points raised, should have any doubt as to the propriety of granting complainant's motion for leave to file its bill to perpetuate testimony, and as to the propriety of perpetuating the testimony in accordance with the prayer of complainant's bill, the matter might be set down for hearing during the present term of the Court and prior to the summer recess, for the reason that from complainant's view point it is very desirable that the testimony sought to be perpetuated be taken as soon as practicable.

Therefore, the objections made and briefs in support thereof, filed on behalf of defendant Harold L. Ickes and on behalf of the California defendants, will be herein discussed.

QUESTIONS PRESENTED

1. Has this Court jurisdiction, in a proper case, to entertain an original bill to perpetuate testimony?

2. Would the proposed testimony, if perpetuated, be admissible in a later action?

3. Is this in real effect a suit against the United States and is the United States an indispensable party?

SUMMARY OF ARGUMENT

1. This Court has jurisdiction to entertain this, an original bill to perpetuate testimony.

2. The testimony sought to be perpetuated herein will be admissible and competent for the purposes stated in the bill.

3. Since the bill seeks no affirmative relief, but merely the perpetuation of testimony and the perpetuation of the testimony does not in any way impair or involve the property rights of the United States, this is not, strictly speaking, a suit against the United States. Again, by reason of the fact that the Congress of the United States expressly made the limitation imposed upon California of use of the waters of the Colorado River system, irrevocably and unconditionally for the benefit of the State of Arizona, and further provided, that the conditions attached to rights of way and privileges from the United States by that Act were for the benefit of Arizona and available to it by way of suit, defense or otherwise in all litigation respecting the waters of the Colorado River, it would seem that Congress has consented to any suit necessary to enforce the limitation and the conditions attached to rights of way. If in the action to be later brought, the United States should be a necessary party and it should be held that the United States has not yet consented to be sued, still it may well be that by the time the later suit is brought, the United States will have expressly consented to be sued in the action then to be brought.

4. The perpetuation of testimony cannot hurt anyone; it merely will permit an offer to be made in the future action of the testimony herein sought to be perpetuated. At that time the Court, in that action, in view of the pleadings

and issues therein, will undoubtedly consider any objections then raised as to the admissibility of such testimony in evidence in that action.

ARGUMENT

1. Has this Court jurisdiction, in a proper case, to entertain an original bill to perpetuate testimony?

The five states of Colorado, Nevada, New Mexico, Utah and Wyoming raise no question as to the jurisdiction of this Court in this proceeding and in fact raise no objection of any kind to the filing of plaintiff's bill and the perpetuation of the testimony in accordance with the prayer thereof.

The defendant Harold L. Ickes is of the opinion that this Court does have jurisdiction in this cause, that is to say, jurisdiction to entertain an original bill to perpetuate testimony in a proper action.

The California defendants do undertake to raise a question as to the jurisdiction of this Court, but do not go so far as to assert that the Court has no jurisdiction to entertain an original bill to perpetuate testimony and do not cite any authority for the question they thus raise.

The question of jurisdiction is briefly discussed in the statement as to jurisdiction appended to complainant's motion for leave to file its bill to perpetuate testimony. In the brief of defendant Harold L. Ickes that discussion is amplified with the conclusion there reached, stated in

the summary of argument on page 11 of defendant Harold L. Ickes brief in the language:

> "I. The Government is of the opinion that in a proper case this Court has jurisdiction to entertain an original bill to perpetuate testimony."

While this is the first time this jurisdiction has been invoked in this Court, still upon authority of Section 2 of Article 3 of the Constitution of the United States and Paragraph 341, Title 28 of the United States Code, together with the authorities cited in the brief of defendant Harold L. Ickes, it seems clear that this Court has jurisdiction in this cause and that no extended argument as to that is necessary.

2. Would the proposed testimony, if perpetuated, be admissible in a later action?

The Colorado River Compact (Bill p. 14 to 24) has not been ratified by complainant State of Arizona and complainant is not bound thereby. It is suggested on page 17 of defendant Harold L. Ickes' brief that since Arizona has not ratified the compact, she cannot claim thereunder, whatever its true meaning, although this suggestion is later modified on the same page of the brief. Of course the Boulder Canyon Project Act does in substance enact the Colorado River Compact as a law of the United States, and further imposes upon the State of California, for the express benefit of complainant State of Arizona (and the other Colorado River basin states) a limitation upon the use of water of the Colorado River in the State of Cali-

fornia and in defining such limitation, specifically refers back to the provisions of the Colorado River Compact (Boulder Canyon Project Act-Bill p. 30).

The Legislature of the State of California, in accordance with the above cited provision of the Boulder Canyon Project Act, has by Chapter 16 of the Laws of California of 1929, limited forever, irrevocably and unconditionally, and for the benefit of the State of Arizona (and the other Colorado River basin states) the aggregate annual consumptive use of water of and from the Colorado River in the State of California, to not exceeding 4,400,000 acre-feet of the waters apportioned to the lower basin states by paragraph (a) of Article III of the Colorado River Compact, plus not more than one-half of any excess or surplus waters unapportioned by said Compact (Bill p. 55).

The geographical and topographical facts of the lower Colorado River basin make it impossible for the waters of the main stream of the Colorado River, present in the lower basin, to be used anywhere in the United States, except in California and in Arizona. Water, therefore, not used in California is available for use in Arizona and Arizona can put to beneficial use all the water that it can obtain from the main stream of the Colorado River. Therefore, the State of Arizona has a very real interest in the proper construction and enforcement of the limitation on use in the State of California of the waters of the Colorado River, imposed by the Boulder Canyon Project Act and the Act of the Legislature of the State of California, both

of which refer to the language of the Colorado River Compact for definition as to the character and extent of the uses of waters of the Colorado River permitted in California under the limitations imposed upon that use.

As set out in the Bill, page 63, defendant Harold L. Ickes has contracted with California users for delivery of 5,362,000 acre-feet of water per annum from the main stream of the Colorado River for use in the State of California and as stated in the Bill, page 65, defendant Harold L. Ickes and California defendants now assert that all waters heretofore or hereafter contracted to be delivered for use in the State of California in excess of 4,400,000 acre-feet, relate to and comprise, 1. the 1,000,000 acre-feet of water permitted to the lower basin by Article III (b) of the Colorado River Compact, and 2. one-half of the surplus water unapportioned by the Colorado River Compact. In this way the California defendants and the defendant Harold L. Ickes propose to avoid and violate the limitations imposed upon the State of California for the benefit of the complainant State of Arizona by the Boulder Canyon Project Act and the Act of the Legislature of the State of California, hereinabove referred to. In reality they propose to use in California, from the main stream of the Colorado River, 4,400,000 acre-feet of the water apportioned to the lower basin by Article III (a) of the Colorado River Compact (Bill, p. 17), the entire 1,000,000 acre-feet permitted to the lower basin by Article III (b), (Bill, p. 18) and one-half of the very small surplus remaining in the river. The limitation was im-

posed for the benefit of the State of Arizona and the State of Arizona is entitled to enforce that limitation according to its true meaning and intent, and is not to be subjected to any such strained construction as is necessary to permit the California defendants to deprive complainant and those claiming under it of the entire benefit of that limitation.

The Colorado River Compact is not nearly so clear and unambiguous as is argued by defendant Harold L. Ickes and the California defendants. In fact it seems to be apparent upon a consideration of the entire compact that the framers thereof were apportioning waters of the main stream of the Colorado River as at Lee Ferry. It must be borne in mind that all of the tributaries of the upper division, or upper basin, empty into the Colorado River above Lee Ferry and that the records of flow upon which the apportionment of the Colorado River Compact was made, were kept at Lee Ferry. It is the natural dividing point between the upper and lower basins, the point at which the waters of the upper basin have reached the main stream and the point at which record as to the total flow was obtainable at that time and now. The Compact, therefore, in Article III (a) apportions 7,500,000 acre-feet per annum to the upper basin and 7,500,000 acre-feet per annum to the lower basin in perpetuity and in order to assure delivery to the lower basin of the 7,500,000 acre-feet per annum, apportioned to it, provided further in Article III (d) as follows:

> "(d) The States of the upper division will not cause the flow of the river at Lee Ferry to be depleted

> below an aggregate of 75,000,000 acre-feet for any period of 10 consecutive years reckoned in continuing progressive series beginning with the first day of October next succeeding the ratification of this compact."

It is very apparent that the foregoing provision was arrived at by multiplying the 7,500,000 acre-feet per annum, apportioned to the lower basin, by Article III (a), by ten, thus dividing between the upper and lower basins the benefit of flood waters.

If the 1,000,000 acre-feet permitted to the lower basin by Article III (b) of the Compact had been considered to be in the main stream of the Colorado River, then the provision of Article III (d) should have been that the states of the upper division will not cause the flow at Lee Ferry to be depleted below an aggregate of 85,000,000 acre-feet for any period of 10 consecutive years, reckoned in continuing progressive series beginning with the first day of October next succeeding the ratification of the compact, otherwise the permission contained in Article III (b) becomes meaningless and valueless for the reason that the upper basin might, without violating any terms of the Compact, prevent its use by withholding the water. This certainly constitutes an ambiguity in the Colorado River Compact, which we submit can be resolved and reconciled only by recognition of the fact that the framers of the Compact intended that the 1,000,000 acre-feet per annum permitted to the lower basin by Article III (b) was not in the main stream at all, but was in the tributaries existing

in the lower basin. In the lower basin there are no tributaries from which water can be obtained for use, except within the State of Arizona and the waters of the tributaries of the State of Arizona, as pointed out in the Bill (pp. 12, 13 and 14) had at that time already been appropriated in large part, and further, entered the Colorado River at a point so far down stream and of such low elevation that it was and is impossible to put the waters thereof to beneficial use in the United States after they reach the main stream of the Colorado River.

Under the construction of the Colorado River Compact and the limitations imposed by the Boulder Canyon Project Act and the Act of the Legislature of the State of California, properly construed as above, California, may, without violating the limitations imposed on it, use from the main stream of the Colorado River, 1. 4,400,000 acre-feet of the 7,500,000 acre-feet apportioned to the lower basin by Article III (a) of the Compact, and 2. not to exceed one-half of the excess or surplus waters of the main stream of the Colorado River unapportioned by the said Colorado River Compact.

Indeed, the construction contended for by Arizona, as above outlined, was never denied or disputed by any of the parties defendant herein, until after the passage of the Boulder Canyon Project Act and until after the Act of the Legislature of the State of California, limiting use within that State, was passed and until after the decision of this Court in the former case of Arizona v. California, 283 U. S. 423. Only after all of these things had occurred, did it

appear to anyone in California or elsewhere, so far as the complainant State of Arizona knows, that it was possible by a strained construction of the Colorado River Compact, the Boulder Canyon Project Act and the Legislative limitation of the Legislature of California, to deny to Arizona and to obtain for California additional water from the main stream of the Colorado River, over and above that permitted by a proper construction and, up to that time, the agreed construction of the Colorado River Compact, the Boulder Canyon Project Act and the Act of the Legislature of the State of California.

Under the construction of that document, as contended for by defendant Harold L. Ickes, and the California defendants herein, California could use from the main stream of the Colorado River, 1. 4,400,000 acre-feet of the 7,500,000 acre-feet apportioned to the lower basin by Article III (a) of the Compact, and 2. 1,000,000 acre-feet permitted to the lower basin by the terms of Article III (b) of the Colorado River Compact, and 3. one-half of the excess or surplus waters, if any, unapportioned by the Colorado River Compact, and further, the California defendants at any rate, and complainant believes defendant Harold L. Ickes, assert that in determining the amount of such surplus or unapportioned waters, the total flow of all Arizona tributaries should be first added to the total flow of the main stream of the Colorado River and that the aggregate flow thus arrived at, in excess of 8,500,000 acre-feet, must be considered surplus or unapportioned waters, one-half of which amount would be subject to ap-

propriation by California from the main stream of the Colorado River. Thus California would seek to get not only the 1,000,000 acre-feet permitted by Article III (b) of the Compact, to which under a proper construction of the Compact she is not entitled, but also in addition would take from the main stream of the Colorado River an amount of water equal to one-half of the total flow of Arizona's tributaries, to which likewise she is not entitled.

The testimony sought to be perpetuated in this proceeding would, therefore, be very clearly admissible and should be considered by this Honorable Court in arriving at the proper construction resolving and reconciling the apparently ambiguous and conflicting provisions of the Colorado River Compact and those imposing upon California the limitations on use to which she is subject by the Boulder Canyon Project Act and the Act of the Legislature of the State of California, according to their true meaning and intent, it being kept in mind that all water present in the main stream of the Colorado River in the lower basin, as defined by the Compact, is susceptible of use in Arizona and can be used nowhere else in the United States, except in Arizona, if not usable in California, and that Arizona has 2,000,000 acres of land which can be irrigated from no other source (Bill, p. 5-6).

Further, it must be pointed out that the Boulder Canyon Project Act no where seeks to deal with the water permitted to the lower basin by Article III (b) of the Compact and in the limitation imposed by that Act upon the State of California, makes no mention of the water per-

mitted by Article III (b) of the Compact. We believe that the proper construction of the Boulder Canyon Project Act and the legislative limitation of the California Legislature imposed on use of the water of the Colorado River system in California, even aside and apart from the testimony herein sought to be perpetuated, indicates that it was never intended either by Congress or the California Legislature that any person in California would ever claim the right to use any portion of the 1,000,000 acre-feet permitted to the lower basin by Article III (b) of the Compact, else permission to do so would have been incorporated in the Boulder Canyon Project Act and in the Act of the Legislature of the State of California.

It is conceded in the brief filed on behalf of defendant Harold L. Ickes that an ambiguity exists in the Boulder Canyon Project Act (p. 18 of brief) as to what waters are included in the limitation upon use in California, of excess or surplus unapportioned by said Compact. That ambiguity can be resolved by the testimony herein sought to be perpetuated, together with further evidence to show that the apparent ambiguity of the Boulder Canyon Project Act was occasioned by the fact that the Congress of the United States recognized and gave effect to the intent and purpose of the framers of the Compact as set forth in complainant's bill. This, complainant hopes to be able to show by competent, relevant and material evidence from the proceedings of the Congressional Committees which considered the Boulder Canyon Project Act and the legislative history of that Act.

The testimony herein sought to be perpetuated concerns an agreement from which arise all of the ambiguities and misunderstandings of the Colorado River Compact, the Boulder Canyon Project Act and the Act of the Legislature of the State of California. Certainly it is material to show the initiation and the reason for the apparent ambiguities and uncertainties of these various documents and complainant, State of Arizona, hopes and believes that it will be able to thus show that the reason no mention is made in the Boulder Canyon Project Act of the 1,000,000 acre-feet permitted to the lower basin by Article III (b) of the Compact, is because Congress considered the 1,000,000 acre-feet permitted by Article III (b) to be in Arizona tributaries for the sole and exclusive benefit of the State of Arizona, in accordance with the understanding, agreement, intent and purpose of the framers of the Colorado River Compact, as set forth in the Bill to perpetuate testimony herein.

That Congress so intended is indicated by the provisions of the Boulder Canyon Project Act itself, Section 4 (A) thereof (Bill, pp. 27, 28, 29, 30) in which Congress authorized a compact between California and Arizona, which should provide among other things:

> "(3) That the State of Arizona shall have the exclusive beneficial consumptive use of the Gila River and its tributaries within the boundaries of said State, and (4) that the waters of the Gila River and its tributaries, except return flow after the same enters the Colorado River, shall never be subject to any dimin-

ution whatever by any allowance of water which may be made by treaty or otherwise to the United States of Mexico, but if, as provided in paragraph (c) of Article III of the Colorado River Compact, it shall become necessary to supply water to the United States of Mexico from waters over and above the quantities which are surplus as defined by said compact, then the State of California shall and will mutually agree with the State of Arizona to supply, out of the main stream of the Colorado River one-half of any deficiency which must be supplied to Mexico by the lower basin."

It was thus clearly indicated by Congress in the very language of the Boulder Canyon Project Act itself, that it intended that the waters of Arizona tributaries should be forever for exclusive beneficial consumptive use within the State of Arizona. Thus, in this portion of the Boulder Canyon Project Act effect was given to the understanding, agreement, intent and purpose of the framers of the Colorado River Compact, as set forth in the Bill, in connection with the 1,000,000 acre-feet per annum permitted to the lower basin by Article III (b) of the Colorado River Compact. The complainant State of Arizona hopes to be able to show in the case hereafter to be brought by it, by competent, relevant and material evidence of the hearings and reports of the Congressional Committees and statements made in Congress and the legislative history of the Act, that it was the intent of Congress to impose a limitation on California by the terms of the Boulder Canyon Project Act of 4,400,000 acre-feet of the water apportioned by

Article III (a) of the Compact, plus one-half of the surplus or unapportioned waters of the main stream of the Colorado River, thereby saving to Arizona its tributaries and the 1,000,000 acre-feet per annum therefrom permitted by the understanding, of which testimony is sought to be perpetuated and assuring to Arizona and those claiming under it the right to appropriate one-half of the surplus or unapportioned waters of the main stream present in the lower basin for use, in excess of the 7,500,000 acre-feet apportioned to the lower basin by Article III (a) of the Colorado River Compact.

Certainly the testimony sought to be perpetuated concerning the agreement, understanding, purpose or intent of the framers of the Colorado River Compact becomes very material in explaining and resolving the apparent ambiguities and conflicting language of the Colorado River Compact, of the Boulder Canyon Project Act and the Act of the Legislature of the State of California.

These ambiguities and inconsistencies claimed by California defendants and defendant Harold L. Ickes to bear no relation to the understanding, agreement, intent and purpose of the framers of the Colorado River Compact, of which Arizona desires testimony perpetuated, can be logically explained by no other means and in no other way than by showing the understanding, agreement, purpose and intent of the framers of the Colorado River Compact and by showing that in enacting the Boulder Canyon Project Act, Congress gave effect and intended to give effect to that understanding, agreement, intent and purpose.

The Act of the Legislature of the State of California follows exactly, as to the limitation imposed upon use of waters of the Colorado River system within the State of California, the language of the Boulder Canyon Project Act and makes no reference whatsoever to Article III (b) of the Colorado River Compact.

The omissions, ambiguities and conflicting provisions of the Colorado River Compact, the Boulder Canyon Project Act and the Act of the Legislature of the State of California, as hereinabove pointed out, can be explained, resolved and reconciled in no other way, except that they were drawn in accordance with and in order to give effect to the understanding, agreement, purpose and intent of the framers of the Colorado River Compact, of which Arizona desires the testimony to be perpetuated in this proceeding, and the complainant State of Arizona hopes to be able to connect all of the matters hereinbefore referred to, so as to make all of the evidence, including the testimony sought to be perpetuated, admissible in an action to be later brought.

The proper construction of the Colorado River Compact, the Boulder Canyon Project Act and the Act of the Legislature of the State of California in limiting the use of water within California, will likewise be material in construing and judicially determining the proper construction of conditions attached to rights of way and privileges from the Federal Government in aid of appropriation and use of water from the Colorado River system, which conditions were attached by Section 13 (b), (c) and (d) of the Bould-

er Canyon Project Act (Bill, pp. 48-49) and as pointed out above, such testimony will be very material in actions to be hereafter brought concerning priority of appropriation and right of appropriation and use of waters from the Colorado River and the relative rights of users thereof in Arizona and in California.

Where in the application of a contract to its subject matter, an ambiguity or uncertainty arises which cannot be removed by an examination of the agreement alone, parol evidence of the circumstances under which it was made and of statements made in the negotiations which preceded may be admitted to resolve the ambiguity and to prove the real intention of the parties.

Kilby Mfg. Co. v. Hinchman-Reuton Fire Proofing Co. 132 Fed. 957 (C. C. A.)

Lonergan v. Buford, 148 U. S. 581.

A writing should be construed with reference to the actual state of the subject matter at the time of its execution and for that purpose extrinsic evidence may be admitted to place the Court or jury in the position of the parties at the time of executing the instrument and thus enable them intelligently to interpret the language used.

West v. Smith, 101 U. S. 263,

Walker v. Brown, 165 U. S. 654,

Runkle v. Burnham, 153 U. S. 216.

The inducing causes leading up to the execution of a written instrument may also be shown to aid in its con-

struction where its phraseology is doubtful or ambiguous.

22 C. J. 1182,

Shellberg v. McMahon, 98 Kans. 46, 157 Pac. 268.

It is very generally held that the negotiations between the parties prior to the execution of a contract or other writing may be admissible for the purpose of aiding the court in the interpretation of the written instrument.

22 C. J. 1183.

It has been well said,

> "In other words the Court was of opinion that the condition of the bond was open to interpretation and that it was its duty, in order to decide upon its meaning, to look not only to the language employed, but to the subject matter and surrounding circumstances. This was in accordance with the rule declared by the Supreme Court in Barreda v. Silsbie, 21 How. 146, 16 L. Ed. 86; Nash v. Towne, 5 Wall. 689, 18 L. Ed. 527; Canal Co. v. Hill, 15 Wall. 94, 21 L. Ed. 64; Mobile & Montgomery R. Co. v. Jurey, 111 U. S. 584, 592, 4 Sup. Ct. 566, 28 L. Ed. 527. We are of the opinion that this evidence was properly admitted."

Findley v. United States, 225 Fed. 337 (C. C. A.)

Again, parol evidence is admissible to show the situation of the parties and the circumstances under which a written instrument was executed for the purpose of ascertaining the intentions of the parties and properly construing the writing.

22 C. J. 1186,

U. S. v. Bethlehem Steel Co., 205 U. S. 105,

Merriam v. U. S., 107 U. S. 437.

Parol or extrinsic evidence of the understanding of the parties in respect to the construction of a written instrument is usually held admissible to explain that which would otherwise be ambiguous and for this purpose evidence of declarations of a party made previous to or at the time of signing the contract is admissible.

22 C. J. 1190,

Fairbanks Morse & Co. v. Nelson, 217 Fed. 218 (C. C. A.)

In view of the foregoing authorities and in view of the varied and great questions to be raised in litigation hereafter, growing out of the Colorado River Compact, the Boulder Canyon Project Act and the legislative limitation on use in the State of California, who can say that the testimony herein sought to be perpetuated will not be admissible? It is respectfully submitted that to perpetuate the testimony does no more than to preserve it so that it may be offered in evidence; that at the time it is offered in evidence the Court will, in view of the pleadings in the then case, consider and rule upon the question of its admissibility.

3. Is this in real effect a suit against the United States and is the United States an indispensable party?

On this question the brief filed on behalf of defendant Harold L. Ickes does not seek to maintain the position

that the present action is a suit against the United States, but seeks to say that the action to be later brought by complainant State of Arizona will necessarily be one against the United States and that, therefore, this present proceeding should be considered an action against the United States, which the complainant State of Arizona cannot maintain because no consent has been given by the United States to be sued in an action seeking to perpetuate testimony.

This seems to be a very specious argument since no relief is prayed as against the United States, it is difficult to see how any consent would be necessary for the maintenance of this action. It may well be that in the event the United States should be a necessary party to the later action to be brought by complainant, consent will have been given by that time by the United States to be sued in such action, so that the point is not now properly before this Court. The testimony certainly, as hereinabove pointed out, will be material in determining the extent of the limitation imposed upon California and the priority of use by the users of the water in Arizona and those in California. To such action it is clear the United States will not necessarily be a party. Again, it is specifically provided by Section 4 (a) of the Boulder Canyon Project Act (Bill, p. 30) that that act should not take effect "until the State of California, by act of its legislature shall agree irrevocably and unconditionally with the United States and for the benefit of the States of Arizona, Colorado, Nevada, New Mexico, Utah and Wyoming, as an express

covenant and in consideration of the passage of this act, that the aggregate annual consumption use (diversions less returns to the river) of water of and from the Colorado River for use in the State of California, including all uses under contracts made under the provisions of this act and all water necessary for the supply of any rights which may now exist, shall not exceed 4,400,000 acre-feet of the waters apportioned to the lower basin States by paragraph (a) of Article III of the Colorado River Compact, plus not more than one-half of any excess or surplus waters unapportioned by said compact, such uses always to be subject to the terms of said compact." And again, in Section 13, paragraph (d), in attaching conditions and covenants running with the land to rights of way and privileges from the United States, it is provided that such conditions and covenants "shall be deemed to be for the benefit of and be available to the States of Arizona, California, Colorado, Nevada, New Mexico, Utah and Wyoming, and the users of water therein or thereunder, by way of suit, defense, or otherwise, in any litigation respecting the waters of the Colorado River or its tributaries." (Bill, p. 49).

It will be borne in mind that the conditions and covenants referred to make all rights of way and privileges from the United States subject to the terms of the Colorado River Compact, and that all of the water contracted to be delivered in California, together with the rights of way therefor across Federal lands, as well as water to be appropriated in the State of Arizona and in the other states of the Colorado River basin, are expressly made

subject to the terms of the Colorado River Compact, and that it is expressly provided that such conditions and covenants are for the benefit of the respective States and available by way of suit, defense or otherwise in litigation respecting the waters of the Colorado River or its tributaries.

If any consent by the United States should be held to be necessary, even for the purpose of maintaining a later action, it seems clear that by these provisions of the Boulder Canyon Project Act, Congress has so consented.

However, it seems probable that this position taken by defendant Harold L. Ickes, is due to a misapprehension appearing on page 9 of his brief in which the statement is made, "The former Secretary of the Interior promulgated certain regulations for the delivery of water (Bill, pp. 56-63) and entered into certain contracts, calling for delivery to users in the State of California of 5,362,000 acre-feet per year (p. 63). This exceeds California's original assignment of the Article III (a) waters by 962,000 acre-feet. Arizona thinks that this excess must come from the 1,000,000 acre-feet of Article III (b), which she says belongs to her (p. 65)".

The complainant State of Arizona alleges that defendant Harold L. Ickes and the California defendants assert that the 962,000 acre-feet relate to and include the water permitted to the lower basin by Article III (b) and that this assertion by defendant Harold L. Ickes and the California defendants is erroneous. The State of Arizona, complainant herein, makes no such contention. On the

contrary, the complainant State of Arizona insists that it can include no part of the water permitted to it by Article III (b) of the Compact, none of which is present in the main stream of the Colorado River at all, and all of which is in the tributaries of the State of Arizona for use within the State of Arizona. The State of Arizona contends that the 962,000 acre-feet referred to in the foregoing quotation is and must be held to be a charge against the one-half of the surplus or waters unapportioned by the Colorado River Compact, permitted to California by its limitation and must be charged against California's permitted surplus, or one-half of such waters.

It certainly will not be contended by the defendant Harold L. Ickes in order to defeat this, or any other action, that he is empowered to make contracts in violation of the Boulder Canyon Project Act and the Congressional limitation therein contained upon use within the State of California, whereby he would nullify and vitiate the limitation placed upon California by that Act, which limitation was expressly made for the benefit of complainant State of Arizona, and that in an action brought by the State of Arizona to enforce that limitation that he could defeat that action upon the ground that the United States was a necessary party thereto, much less is there any logic in the position that this action to perpetuate testimony, with no affirmative relief prayed at all, should be construed as an action against the United States, or one involving its property interests or rights.

The cases cited to this point in behalf of defendant Harold L. Ickes and in the brief of the California defendants, are not in point and no authority is cited in this, or any other Court, in which it was held that a bill to perpetuate testimony would not be entertained because perchance in some future action, in which it might be offered in evidence, it would be necessary to join the soverign as a defendant. It may be necessary, or it may not be necessary, but in either event the mere perpetuation of the testimony calls into question no property right of the United States which could only be effected, if at all, in a later action.

On page 34 of the brief of the California defendants, it is urged that the United States is an indispensable party to this action, to any future action that might be brought and that, therefore, the testimony should not be preserved for offering in any action involving the question of priority of use by the Arizona users of water and California users of water, or otherwise. In other words, the argument on this point by the California defendants and by defendant Harold L. Ickes is that while the limitation imposed upon California's use of waters from the Colorado River is made unconditionally and irrevocably in the language of Congress and in the language of the Act of the Legislature of California, for the benefit of the State of Arizona (and the other basin states) still Arizona cannot enforce that limitation or claim the benefit thereof because in order to do so, the United States would be an indispensable party and the United States has not consented to be sued. Defendant Harold L. Ickes and the

California defendants would thus avoid the Act of Congress of the United States and the Act of the Legislature of the State of California and deny to Arizona the benefit of the protection of that limitation, although in terms it was made for the benefit of Arizona by the Congress of the United States.

We submit that none of the defendants can violate, vitiate or nullify that limitation, contrary to the will of the Congress of the United States and defeat the jurisdiction of this Court to determine the correct construction of that limitation by claiming that such action would necessarily constitute a suit against the United States without its consent.

On pages 31 and 32 of the brief of the California defendants, an argument is attempted to the effect that the mere perpetuation of the testimony herein sought by complainant State of Arizona, would do great harm.

We submit that in its order for the taking of the testimony the Court may very properly reserve to defendants the right to object to the reception in evidence of the testimony sought to be perpetuated, at the time and in whatever tribunal or tribunals it may be offered in evidence in a later action or actions and that the mere perpetuation of the testimony can do no harm.

It is apparent that the defendant Harold L. Ickes and the California defendants herein are by their objections and briefs trying to prevent the mere offer in evidence of

the testimony herein sought to be perpetuated, upon the theory that if it is not now perpetuated it will be lost to complainant State of Arizona and it will be impossible to ever present the question of its admissibility to this, or any other Court.

The result to be accomplished by the perpetuation of the testimony is to secure to complainant and other parties in this action the right to offer in evidence the testimony herein sought to be perpetuated subject to a then ruling as to its admissibility under the pleadings in an action in this Court to be later brought.

We submit also that an order for the perpetuation of this testimony will not be construed by any Court as a ruling that it is admissible in evidence in any action to be later brought by the parties hereto, and that the mere perpetuation of the testimony will not create any unwarranted doubt or cloud to the detriment of any of the parties to this action.

We also submit that the perpetuation of the testimony, which may become material, is in the best interests of justice and fair dealing between the parties to this action; that the refusal to perpetuate the testimony would forever render it impossible for any Court to pass upon its admissibility in any subsequent action and thus the refusal to perpetuate the testimony would defeat justice rather than promote it.

CONCLUSION

In conclusion we agree with and adopt the statement on page 20 of the brief of defendant Harold L. Ickes, as follows: "That case will not depend on any legalistic claim on either side, but on the provisions of the controlling legislation and the consideration of equal and fair dealing between States, and actual beneficial uses of the water, which this Court has applied in all these cases."

This quotation refers to the case to be brought in the future by the complainant State of Arizona as to priority of use of water, as to conditions attached to rights of way and as to relative rights to appropriate water and as to the proper construction of the limitation placed on California. With the statement made the complainant is in entire accord and in order to properly construe "the provisions of the controlling legislation" and in order to bring to this Court evidence which will aid it in determining "the consideration of equal and fair dealing between States", we respectfully submit that the motion for leave to file bill to perpetuate testimony should be granted and that the testimony should be ordered taken at the earliest practicable moment.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1933

No. (Original)

STATE OF ARIZONA,
Complainant,

vs.

STATE OF CALIFORNIA ET AL.,
Defendants,

BRIEF ON BEHALF OF THE STATE OF CALIFORNIA, PALO VERDE IRRIGATION DISTRICT, IMPERIAL IRRIGATION DISTRICT, COACHELLA VALLEY COUNTY WATER DISTRICT AND CITY OF LOS ANGELES, IN REPLY TO BRIEF OF THE STATE OF ARIZONA.

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QUESTIONS PRESENTED

1. Has this court jurisdiction to entertain an original bill to perpetuate testimony?

2. Would the proposed testimony, if taken, be admissible for any purpose suggested by the complainant?

3. Is the United States, which has not consented to be sued, an indispensable party?

CONSTITUTION AND STATUTES INVOLVED

Constitution of the United States, Article III, section 2, clauses 1 and 2.

Tenth Amendment to the Constitution of the United States.

Eleventh Amendment to the Constitution of the United States.

The Boulder Canyon Project Act, approved December 21, 1928, c. 42, 45 Stat. 1057-1067. This act appears in full in the bill, pp. 25-52.

The Colorado River Compact, authorized by the act of August 19, 1931, c. 72, 42 Stat. 171, signed at Santa Fe, New Mexico, November 24, 1922, and approved by the Boulder Canyon Project Act, *supra*. The Compact appears in full in the bill, 14-24.

An act of the California Legislature entitled "An act to limit the use by California of waters of the Colorado River in compliance with the act of Congress known as the 'Boulder Canyon Project Act,' approved December 21, 1928, in the event the Colorado River Compact is not approved by all of the States signatory thereto," approved by the Governor March 4, 1929, California Stats. 1929, p. 38, c. 16. This act appears in full in the bill, pp. 54-56.

SUMMARY OF ARGUMENT

I

The question of jurisdiction may be open to doubt.

II

The testimony sought would be inadmissible in any suit or proceeding.

1. Article III (b), for the construction of which the testimony is sought, is clear and unambiguous. Ambiguities in other portions of the Compact, if any, are irrelevant.

2. The Compact, being a statute, cannot be construed by parol evidence.

3. The Compact is a contract between States, not negotiators, and the intent of the negotiators, undisclosed to the Legislatures, cannot be material.

4. To order the taking of inadmissible testimony would be harmful.

III

The United States is an indispensable party and has not consented to be sued.

ARGUMENT

I

THE JURISDICTION

Arizona, in her brief (p. 7), states that this is the first time this jurisdiction has been invoked in this court. This fact alone makes an inquiry

as to jurisdiction highly pertinent. As said by this court in *Rhode Island* vs. *Massachusetts,* 12 Peters 657, 717:

> "However late this objection has been made, or may be made in any cause, in an inferior or appellate court of the United States, it must be considered and decided, before any court can move one further step in the case; as any movement is necessarily the exercise of jurisdiction."

It will be remembered that by the tenth amendment to the Constitution "The powers not delegated * * * are reserved to the States, respectively, or to the people." This has particularly been held to apply to the rights of sovereignty which the States possessed before the adoption of the Constitution of the United States. One of the rights or attributes of sovereignty has always been immunity from suit without the consent of the sovereign.

A limited consent has been given by Article III, Sec. 2 of the Constitution. The States there consented to the exercise of the Federal judicial power in "* * * controversies between two or more States * * *"

Again, as said by the court in *Rhode Island* vs. *Massachusetts, supra,* at page 719:

> "* * * But as this court is one of limited and special original jurisdiction, its action must be confined to the particular cases, controversies, and parties over which the Constitution and laws have authorized it to act; * * *"

Each State has consented to suit (in this connection) only where there is a controversy between itself and one or more other States.

This leads to the inquiry suggested in our opening brief (p. 18) whether or not this limited consent, on the part of the State, embraces a proceeding in which there is no present controversy and the exact nature of the future controversy is not known and indeed it is not definitely known that there will ever be a controversy. Under the Constitution, for this court to exercise original jurisdiction in a matter between States there must be a controversy.

The first clause of section 2 of Article III, embracing all cases in law and equity arising under the Constitution and laws of the United States, does not confer jurisdiction where a State is a party.

Hans vs. *Louisania,* 134 U. S. 1;
North Carolina vs. *Temple,* 134 U. S. 22.

See

XIth Amendment to Constitution of the United States.

II

THE TESTIMONY SOUGHT WOULD NOT BE ADMISSIBLE IN ANY PROCEEDING UPON ANY OF THE ALLEGED ISSUES REFERRED TO IN THE PROPOSED BILL

The reasons why the proposed testimony would not be admissible in any suit which Arizona may

bring are fully presented and supported by authority in the opening brief filed by the California defendants.

Arizona's brief does not meet the issues raised by the California brief on this subject. The testimony sought relates solely to the "meaning and intent" of Article III (b) of the Compact. (California's opening brief, p. 8.) The California defendants showed in their brief: (1) That Article III (b) is in no respect ambiguous or uncertain, and therefore is not open to construction; (2) That the Compact is a statute and a treaty and, even if found to be open to construction, cannot be construed by the aid of parol evidence; (3) That the "meaning and intent" ascribed by Arizona to Article III (b) and the alleged agreement to make a supplemental compact, which are alleged to be known only to the negotiators who met at Santa Fe, therefore, were never disclosed to Congress nor to the Legislatures of the States, who were the contracting parties. They cannot, therefore, be admissible in evidence to determine the intent of the contracting parties.

Arizona does not directly or indirectly refute any of these propositions.

1. ARTICLE III (b) IS PLAIN AND UNAMBIGUOUS AND IS THEREFORE NOT OPEN TO CONSTRUCTION.

Although she claims, by generalized allegations and conclusions of law, that the "meaning and intent" ascribed by the Secretary of the Interior

and certain other defendants to Article III (b) of the Compact are erroneous, Arizona does not in her bill attempt to show that Article III (b) is in any respect ambiguous or uncertain. In fact, it affirmatively appears from the allegations on pages 12 and 13 of the bill that all the negotiators understood precisely what the language of Article III (b) meant, since it is alleged that "* * * it was agreed that in view of the fact that no appropriation or allocation of water had otherwise been made by said Compact directly to any State, the one million acre-feet for the State of Arizona should be included in said Compact *by an allocation for the Lower Basin.*" (Italics supplied.) In no particular has Arizona, either in the bill or in her brief, pointed out any ambiguity in Article III (b).

What Arizona has endeavored to do in her brief is to point out what she considers to be inconsistencies, contradictions, omissions, and uncertainties in other parts of the Compact than Article III (b) and in the Boulder Canyon Project Act and the California Limitation Act. Parenthetically, analysis shows that the alleged uncertainties do not exist. Whether such uncertainties exist or not is immaterial to the present inquiry. The testimony sought to be taken relates solely, as alleged by Arizona, to the meaning and intent of Article III (b). (Bill, 10-13, 14, 64, 65, 66, 68.)

As shown in the opening brief of the California defendants, the terms of Article III (b) are plain and unmistakable. It states:

"(b) In addition to the apportionment in paragraph (a), the *Lower Basin* is hereby given the right to increase its beneficial consumptive use of such waters by 1,000,000 acre-feet per annum." (Italics supplied.)

The term "Lower Basin" is explicitly and plainly defined in Article II (g). Under this definition there is no room for construction or interpretation by which Article III (b) could be so altered as to substitute the term "Arizona" for the term "Lower Basin."

Since there is no uncertainty nor ambiguity in Article III (b), there is no room for construction, whether the Compact is regarded as an ordinary contract, or as a treaty or statute.

2. THE COLORADO RIVER COMPACT IS A STATUTE AND THE RULES OF STATUTORY CONSTRUCTION MUST PREVAIL

The Colorado River Compact constitutes both a treaty and a statute. (California's opening brief, pp. 20-29.) Even if the Compact were found to be open to construction, it cannot, under familiar rules of statutory construction, be construed by the aid of parol evidence. The authorities submitted in this regard have not been challenged by Arizona. While this is, perhaps, the most conclusive element in this proceeding, it is not mentioned in her brief. She does cite (brief, pp. 20-22) a number of cases to the general effect that where ambiguity or uncertainty exists in an ordinary contract, which

ot be removed by examination of the agreement , parol evidence of the circumstances existing e time the contract was made, the state of the ct matter, etc., may be admissible. If these are properly applied to the subjects to which relate, these defendants have no quarrel with . None of them relate to construction of a y or statute. Even if the Compact were ded simply as a contract, still it is not a con- between the negotiators who met at Santa it is a contract between sovereign States, oved by the United States. No like situation own in any of Arizona's authorities. Accord- , Arizona's authorities have no relevancy to natter before this court.

THE COMPACT IS BETWEEN THE SEVERAL STATES AND THE UNITED STATES, AND NOT BETWEEN THE NEGOTIATORS.

e discussions, understandings and alleged ement referred to in the bill are alleged to been had between the negotiators representing even States. These negotiators had no power ind the States. They did not execute nor orize the Compact. That was done by the slatures of the six States which ratified it and the Congress. The "meaning and intent" bed by Arizona to Article III (b) and the ed agreement to make a supplemental compact alleged to be known only to the negotiators met at Santa Fe. (Bill pp. 66-67.) They were

not, therefore, disclosed to Congress nor to the Legislatures. By no process of reasoning could these oral discussions and negotiations of the negotiators at Santa Fe in 1922 be used to explain or construe the Boulder Canyon Project Act adopted by Congress in 1928, nor the acts of the California Legislature, adopted in 1929. If the intent of the Compact is in question, it is the intent of the United States and of the six States, the contracting parties, represented by their responsible agents, the Congress and the six Legislatures.

4. AN ORDER TO TAKE THE TESTIMONY SOUGHT WOULD BE HARMFUL

Arizona claims (brief p. 5) that "The perpetuation of testimony cannot hurt anyone; it will merely permit an offer to be made in the future action of the testimony herein sought to be perpetuated."

This court will not order the doing of an idle act simply to the end that obviously inadmissible testimony may be offered in some future proceeding. The California defendants pointed out in their opening brief (p. 31) how this inadmissible and improper testimony would be harmful. The Colorado River Compact is designed to stabilize water rights on the river. Water, in these arid Western States, is of transcendent importance. By the approval of the Compact it was thought that these States could live together in peace and harmony so

far as water rights on the Colorado are involved. The testimony which Arizona seeks to have perpetuated is allegedly for the purpose of showing in some future action that the Compact does not mean what it plainly says. For this very reason, the taking of the testimony would tend to cast a doubt upon the Compact which would remain unsolved until that future day when the testimony is offered and passed upon by the court. In the meantime all of the great enterprises dependent upon the Compact will be laboring under a cloud of uncertainty.

III

THE UNITED STATES IS AN INDISPENSABLE PARTY

These defendants deem that the argument on this point has been adequately presented in the opening brief of California defendants.

Respectfully submitted.

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o

No. (Original)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1933.

STATE OF ARIZONA, *Complainant,*

v.

STATE OF CALIFORNIA, ET AL., *Defendants.*

RETURN ON BEHALF OF THE STATE OF CALIFORNIA, PALO VERDE IRRIGATION DISTRICT, IMPERIAL IRRIGATION DISTRICT, COACHELLA VALLEY COUNTY WATER DISTRICT, THE METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, CITY OF LOS ANGELES, CITY OF SAN DIEGO, AND COUNTY OF SAN DIEGO TO THE RULE TO SHOW CAUSE DATED FEBRUARY 20, 1934,

AND

BRIEF IN SUPPORT OF RETURN TO THE RULE.

I. W. STEWART,
ARVIN B. SHAW, JR.,
for Palo Verde Irrigation District.
CHAS. L. CHILDERS,
for Imperial Irrigation District.
I. W. STEWART,
ARVIN B. SHAW, JR.,
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1933.

No. ORIGINAL

STATE OF ARIZONA, *Complainant,*

v.

STATE OF CALIFORNIA, ET AL., *Defendants.*

RETURN TO RULE TO SHOW CAUSE.

The defendants, the State of California, Palo Verde Irrigation District, Imperial Irrigation District, Coachella Valley County Water District, The Metropolitan Water District of Southern California, City of Los Angeles, City of San Diego, and County of San Diego, responding to the Court's Rule to Show Cause dated February 20, 1934, subject to the motion of the State of Arizona for leave to file its bill to perpetuate testimony, for the reasons following:

1. The bill sought to be filed shows on its face that the proposed testimony would not be admissible in evidence; this Court should not compel the taking of such testimony, and the defendants should not be burdened by the taking of it.

2. The bill sought to be filed shows on its face that the United States is an indispensable party, and the bill should not be received in the absence of consent of the United States to be sued.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933.

NO. (ORIGINAL)

STATE OF ARIZONA, *Complainant,*

v.

STATE OF CALIFORNIA, ET AL., *Defendants.*

BRIEF OF THE STATE OF CALIFORNIA, PALO VERDE IRRIGATION DISTRICT, IMPERIAL IRRIGATION DISTRICT, COACHELLA VALLEY COUNTY WATER DISTRICT, THE METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, CITY OF LOS ANGELES, CITY OF SAN DIEGO, AND COUNTY OF SAN DIEGO,

IN SUPPORT OF THEIR RETURN TO THE RULE.

JURISDICTION.

This is an original action by a State, asserting jurisdiction under the Constitution of the United States, Article III, section 2, clauses 1 and 2 (bill, p. 71), and United States Code, Title 28, paragraph 341. Rule 5 of this Court is cited (bill, p. 71). The complainant's motion for leave to file a bill to perpetuate testimony was submitted February 14, 1934. The rule to show cause issued February 20, returnable April 2, 1934.

QUESTIONS PRESENTED.

1. Has this Court jurisdiction to entertain an original bill to perpetuate testimony?

2. Would the proposed testimony, if taken, be admissible for any purpose suggested by the complainant?

3. Is the United States, which has not consented to be sued, an indispensable party?

CONSTITUTION AND STATUTES INVOLVED.

Constitution of the United States, Article III, section 2, clauses 1 and 2.

United States Code, Title 28, Section 341.

The Boulder Canyon Project Act, approved December 21, 1928, c. 42, 45 Stat. 1057-1067. This Act appears in full in the Bill, pp. 25-52.

The Colorado River Compact, authorized by the Act of August 19, 1921, c. 72, 42 Stat. 171, signed at Santa Fe, New Mexico, November 24, 1922, and approved by the Boulder Canyon Project Act, *supra*. The Compact appears in full in the Bill, pp. 14-24.

An act of the California legislature entitled "An act to limit the use by California of waters of the Colorado River in compliance with the act of Congress known as the 'Boulder Canyon Project Act', approved December 21, 1928, in the event the Colorado River Compact is not approved by all of the States signatory thereto", approved by the Governor March 4, 1929; California Stats. 1929, p. 38, c. 16. This act appears in full in the Bill, pp. 54-56.

STATEMENT.

This case brings before the Court for the second time the Colorado River Compact and the Boulder Canyon Project Act. (*Arizona v. California,* 283 U. S. 423.)

The State of California and the defendants which are public agencies of that State oppose the motion of the State of Arizona upon two grounds: (1) the proposed testimony would not be admissible in evidence, and this Court should not compel the taking of such testimony; (2) the United States is an indispensable party, and the bill should not be received in the absence of consent of the United States to be sued.

The proposed bill seeks to perpetuate the testimony of certain men who participated in conferences at which was formulated the draft of the Colorado River Compact, signed at Santa Fe, New Mexico, November 24, 1922 (bill, p. 66). Arizona is not a party to the Colorado River Compact (bill, p. 24). No suit has yet been filed against anyone in which this evidence will be used (bill, p. 68). No cause of action has yet accrued to Arizona (bill, p. 68).

Arizona sets up five "issues" upon which it is alleged that the proposed testimony will be material in future actions (bill, pp. 67-68); that is, (1) in determining the true meaning and intent of the Colorado River Compact; (2) in determining the true meaning and intent of the Boulder Canyon Project Act; (3) in determining the true meaning and intent of the conditions which the Boulder Canyon Project Act requires to be attached to patents, grants, contracts, concessions, leases, permits, licenses, rights of way and other privileges from the United States;

(4) in determining the true purpose and meaning of the limitation of use in the State of California of waters of the Colorado River imposed by the Boulder Canyon Project Act and an act of the California legislature, which is recited in the bill (p. 53); and (5) determining the relative and respective rights of each of the parties to this action in the water of the Colorado and its tributaries and the use thereof and the burdens and restrictions imposed on such use.

Thus it is proposed to preserve testimony of oral conversations for the purpose of construing two statutes, a written interstate treaty, a group of written contracts, and certain undefined "relative rights" not yet subject to adjudication.

While the five "issues" are specifically mentioned in the bill and discussed separately herein it is to be noted that each and all of them rest solely upon the claim that Article III (b) of the Compact should be given some different meaning from that apparent on its face. The evidence sought to be perpetuated relates back to an alleged agreement respecting the meaning of that Article. The witnesses named in the bill are alleged to know of such an agreement (bill, p. 66). It is not alleged that evidence can be elicited from the proposed witnesses regarding the making or enacting of any other instrument set out or referred to in the bill. A determination, therefore, of the case in relation to said Article III (b) must prove controlling as to the other "issues".

The Compact, printed in full in the bill (pp. 14-24) is an agreement among the States of California, Nevada, Utah, Wyoming, Colorado, and New Mex-

ico. (bill, p. 24.) These States, with Arizona, comprise the Colorado River Basin (bill, pp. 5, 16).

As a matter of procedure, the States sent negotiators to various conferences. A draft of the Compact was prepared, but by its terms it was not binding until approved by the several State Legislatures, and by the Congress (bill, p. 23). The Compact was signed by the negotiators at Santa Fe, New Mexico, Nov. 24, 1922 (bill, p. 24). A negotiator representing Arizona signed the final draft of the Compact, but the legislature of that State did not ratify his act or approve the Compact (bill, p. 24). The other States named, through their respective State Legislatures, and the United States through the Congress, duly approved the Compact and (the requirement that all seven states act favorably having been waived) the agreement became binding upon them.

We mention these details at the outset for the purpose of specifically directing the attention of the Court to one of the controlling facts in the pending cause, *i. e.,* that the conversations herein sought to be perpetuated as testimony occurred, not between contracting parties in the ordinary sense, but between negotiators or delegates who acted without power to bind their respective States. The actions which ultimately bound the signatories to the Compact were the actions of the several legislative bodies which approved the document. The intent of these legislative bodies must be determined by the language before them. It cannot be judged by conversations between delegates in which legislatures did not participate.

Article III of the Compact (pp. 17-19) undertook an apportionment of part of the flow of the Colo-

rado River System, and is the subject of this proceeding. Article III(a), (bill, p. 17) apportioned from the Colorado River System to the "Upper Basin" and to the "Lower Basin", respectively, the exclusive beneficial consumptive use of 7,500,000 acre feet of water per annum, or a total of 15,000,000 acre feet. Article III(b), (bill, p. 18) provided that in addition to the apportionment in Paragraph (a), the "Lower Basin" was given the right to increase its beneficial consumptive use by 1,000,000 acre feet per annum. The Compact recognized that there were surplus waters, unapportioned by the Compact. (Art. III(f); bill, p. 19.) The terms "Colorado River System", "Lower Basin", and "Upper Basin", are all defined in Article II (bill, p. 16-17).

All of the proposed testimony is said to relate to the "meaning and intent" of Article III(b). It is not alleged that this paragraph is ambiguous, or the result of mistake or fraud, but that the negotiators, in agreeing upon Article III(b), also entered into another and collateral agreement not appearing on the face of the Compact. (Bill, p. 13.) Article III(b), is quoted in the bill as reading (bill, p. 13):

> "(b) In addition to the apportionment in paragraph (a), the *Lower Basin* is hereby given the right to increase its beneficial consumptive use of such waters by one million acre foot per annum." (Italics supplied; and see p. 18 of the bill.)

The alleged collateral agreement, not appearing in the Compact, is said by complainant to be as follows (bill, p. 14):

> "that the waters apportioned by Article III(b), of said Compact were for the sole and exclusive use and benefit of the *State of Arizona*, and it was further agreed that a supplemental Compact between the States of California, Nevada, and Arizona should be adopted and that such supplemental Compact should so provide." (Italics supplied.)

The "meaning and intent" ascribed by Arizona to Article III(b) of the Compact, and which the proposed testimony is said to prove, contradicts the definition of "Lower Basin" written by the negotiators of the Compact and now appearing in Article II(g) of the Compact (bill, p. 17):

> "(g). The term "Lower Basin" means those parts of the States of Arizona, California, Nevada, New Mexico, and Utah within and from which waters naturally drain into the Colorado River system below Lee Ferry, and also all parts of said States located without the drainage area of the Colorado River system which are now or shall hereafter be beneficially served by waters diverted from the system below Lee Ferry."

Thus the Compact defines the Lower Basin as including parts of five States, whereas Arizona seeks to show that the words "Lower Basin" appearing in Article III(b), mean Arizona solely and exclusively.

It is ~~admitted~~ not claimed that ~~Arizona never ratified~~ the agreement of the negotiators was reduced to writing or ratified by any defendant, or that its existence was reported to any legislature. In fact Arizona alleges (bill p. 68):

> "That the witnesses hereinbefore named *alone* know the facts herein stated * * *". (Italics supplied.)

It is admitted that Arizona never ratified the Colorado River Compact negotiations (bill, p. 24). It is admitted that no supplemental Compact between California, Nevada and Arizona has ever been negotiated or signed (bill, p. 24).

Nevertheless, it is alleged (bill, p. 66):

> "(l) That the true purpose and meaning of said subdivision (b) of Article III of said Compact can be determined and established by the testimony of certain persons present at the time the Compact was negotiated and signed, as parties thereto, their advisors, agents, and attorneys who were present at their negotiations and the signing of said Compact, and who alone know the facts relating to the true construction, meaning and intent of said subdivision (b) of Article III of said Colorado River Compact as hereinabove set forth."

This testimony, although known only to the witnesses named in the bill, will, it is said, also be material in showing the meaning and intent of the Boulder Canyon Project Act (bill, p. 67), enacted six years later. (Bill, p. 52.)

The Boulder Canyon Project Act, 45 Stat. 1057 (bill, pp. 25-52) effected four major objectives:

(I) Approved the Compact (sec. 13a; bill, p. 47) subject to certain conditions (sec. 4a; bill, p. 29), which were complied with (bill, p. 52), and authorized subordinate Compacts among the Lower Division States (sec. 4a; bill, p. 31) and among the States of the entire system (sec. 19; bill, p. 51). One of the conditions to approval of the Compact was the enactment of a law by California limiting its use of Colo-

rado River water to 4,400,000 acre feet of the waters apportioned by article III (a) of the Colorado River Compact, plus not more than one-half of any excess or surplus waters unapportioned (sec. 4a; bill, p. 30). This was done (bill, pp. 53-56).

(II) Authorized the construction of large works: a dam, power houses, etc., at Black Canyon or Boulder Canyon (sec 1; bill, p. 25); a canal connecting the Imperial and Coachella Valleys with the Colorado River (sec. 1; bill, p. 26); and the appropriation of $165,000,000 (sec. 3; bill, p. 29).

(III) Authorized contracts to be made by the Secretary of the Interior, under general regulations, for the generation and sale of energy, in order to make the project self-supporting (sec. 4(b); bill, p. 32; sec. 5; bill, pp. 33-35) and the delivery of stored waters (sec. 5; bill, p. 34).

The California defendants are entities named in the Secretary's water-delivery regulations (bill, pp. 56-63). The All-American Canal was to be separately financed (Act, sec. 1; bill, p. 26; sec. 4b; bill, p. 33).

(IV) Subjected all the authorizations contained in the Act to the Colorado River Compact, including the construction of the dam and canal (sec. 1; bill, pp. 25, 26); the proposed Lower Basin agreement (sec. 4b; bill, p. 31); the use of the dam and reservoir (sec. 6; bill, p. 39); again, the construction, management, and operation of all works (sec. 8(a); bill, p. 42); the rights of the United States and those claiming under it to Colorado River waters (sec. 13(b); bill, p. 48); all patents, grants, contracts, concessions, leases, permits, licenses, rights of way, or other privileges (sec. 13(c); bill, p. 48); and all new compacts (sec. 19; bill, p. 51).

The Act also contained other authorizations, but these are not related to any allegation in the bill.

By virtue of provisions in the Boulder Canyon Project Act, the United States, in the control and operation of its property, would be affected by the restatement of the Compact proposed by Arizona (bill, p. 42):

> "Sec. 8(a) The United States, its permittees, licensees, and contractees, and all users and appropriators of water stored, diverted, carried, and-or distributed by the reservoir, canals, and other works herein authorized, shall observe and be subject to and controlled by said Colorado River Compact in the construction, management and operation of said reservoir, canals and other works, and the storage, diversion, delivery, and use of water for the generation of power, irrigation, and other purposes, anything in this act to the contrary notwithstanding, and all permits, licenses, and contracts shall so provide."

Again (bill, p. 48):

> (Sec. 13) "(b) The rights of the United States in and to waters of the Colorado River and its tributaries howsoever claimed or acquired, as well as the rights of those claiming under the United States, shall be subject to and controlled by said Colorado River Compact."

See also sections 1 (bill, p. 25) and 6 (bill, p. 39).

The United States is not a party to this action.

The Act of the legislature of California, referred to in the bill (p. 53), accepted the limitation upon use of Colorado River water in California proposed by section 4a of the Boulder Canyon Project Act (bill, p. 30).

While the point is subject to serious question, it is assumed in the argument which follows that Arizona has an interest in the proper construction of the Colorado River Compact, although not a party to it, because of the incorporation of the Compact in the Boulder Canyon Project Act and in California's legislative agreement with the United States limiting use of water in that State. The question argued herein is whether the Compact may be construed in the manner attempted here, and in the absence of the United States as a party.

SUMMARY OF ARGUMENT.

I.

The question of jurisdiction of the Court may be open to doubt.

II.

The proposed testimony would not be admissible in evidence upon any issue stated in the bill. The Court should not compel the taking of such testimony, and the defendants should not be burdened by the taking of it.

1. The proposed testimony, being parol, is not admissible to construe, vary or contradict the Colorado River Compact. First, the Compact is a treaty between States and a statute binding upon the States and their citizens. Second, the Compact is a written agreement. Third, the alleged parol agreement between the negotiators of the Compact could not be effective to modify the Compact between the States, since the parol agreement was not ratified by the States nor shown to have been incorporated in the legislative history of any of the Acts by which the Compact was ratified by the six legislatures or consented to by Congress.

2. The proposed testimony would not be admissible in interpretation of the Boulder Canyon Project Act. The rules of statutory construction would prevail. It is not claimed that the alleged agreement was made a part of the legislative history of that act, or that Congress consented to or ratified it, or knew of its existence.

3. The proposed testimony would not be admissible in interpretation of the conditions imposed by the United States on the use of the public lands, and, if it were, this Court has held that Arizona has no interest in such conditions.

4. The proposed testimony would be inadmissible in interpretation of the legislative agreement between the United States and California limiting the use of water in California. It is not alleged that the supposed Santa Fe conversations made a part of the legislative history of the California statute, or that Congress intended to require that the statute of California refer to a compact differing from the plain language of the Compact as written.

5. The proposed testimony would be inadmissible in any action to establish the relative rights of Arizona and the defendants in the waters of Colorado River system. Nor would proof of the alleged acts of the defendants' negotiators charge the defendants with any duty or confer any right upon them outside the Compact. The alleged plan to enter into a Nevada-California-Arizona Compact cannot be specifically enforced.

6. Since the proposed testimony could not be received under established rules of evidence it should not be taken.

III.

The United States in an indispensable party to this cause, and cannot be sued without its consent. The United States is governed by the Colorado River Compact in carrying out the Boulder Canyon Proj-

ect Act, including the use of its storage works and delivery of water therefrom, and should be heard on the question of whether testimony is to be taken with a view to interpreting or modifying the Compact. Even if the proposed testimony were admissible in a later cause involving these defendants it could not affect the United States, and it would be inequitable to the defendants to compel the taking of testimony which might be asserted to control their use of Colorado River water, but not the government's disposition of it.

ARGUMENT.

I.

The Jurisdiction.

The jurisdiction of this Court to entertain this proceeding lies at the threshold. Arizona admits in her statement on jurisdiction (p. 71) that the Congress has never, by statute, recognized that this Court had the power to perpetuate testimony. Apparently no such statute exists. (We do not argue, of course, that such statute is required.) No rule of this Court expressly refers to such proceedings. This Court has never, so far as the books show, in the one hundred and fifty years of its existence, declared or exercised such jurisdiction.

Inasmuch as the case is one of first impression and Arizona has failed to furnish the Court with any substantial authority to support jurisdiction, we have given the subject consideration. While we are not prepared to assert that the Court has not jurisdiction, there is sufficient doubt to warrant us in laying before the Court, for such consideration as it may merit, the reasons why jurisdiction may be questioned.

Jurisdiction has been defined by this Court as "the power to hear and determine the subject matter in controversy between parties to a suit, to adjudicate or exercise any judicial power over them; * * *" (*Rhode Island v. Massachusetts*, 12 Peters 657, 718.)

This Court has original jurisdiction in "controversies between two or more States". (Constitution, Article III, Section 2, Clauses 1 and 2.)

If there is no "controversy", then there is no jurisdiction in this Court.

For the Court to entertain this Bill, it must exercise jurisdiction. The granting of a commission to take testimony is as much an exercise of jurisdiction as would be the pronouncing of a judgment.

The Constitution makes a "controversy" indispensable to the jurisdiction of this Court over an action between States. Does a mere claim that a controversy will arise at some indefinite time in the future satisfy this requirement?

It may be contended by Arizona that this proceeding is within the general equity powers of this Court, because it was within the powers formerly exercised by English Courts of Chancery. But this does not necessarily follow. This Court's equity powers in actions between States are limited and qualified by the Constitution, in that there *must be* a controversy. Nor does it necessarily follow that, because this Court may have jurisdiction of the future substantive controversy, it has jurisdiction of this proceeding, as an incident thereto. Because the Constitution itself demands that there be a controversy, it might seem that jurisdiction cannot now affirmatively be found to exist, when no controversy now exists, and there is an uncertainty whether the alleged future controversy will ever come into being.

If the Court determines that it has jurisdiction, the next question is whether it should exercise its jurisdiction. This is a power highly discretionary in its nature.

The jurisdiction of this Court in actions between States, as said in *Louisiana v. Texas,* 176 U. S. 1, 15,

> "is of so delicate and grave a character that it was not contemplated that it would be exercised save when the *necessity* was *absolute* and the matter in itself properly justiciable." (Italics supplied)

As said in *North Dakota v. Minnesota,* 263 U. S. 365, 374:

> "In such action by one State against another, the burden on the complainant State of sustaining the allegations of its complaint is much greater than that imposed upon a complainant in an ordinary suit between private parties. 'Before this Court can be moved to exercise its extraordinary power under the Constitution to control the conduct of one State at the suit of another, the threatened invasion of rights must be of serious magnitude and it must be established by clear and convincing evidence.' New York v. New Jersey, 256 U. S. 296, 309; Missouri v. Illinois, 200 U. S. 496, 521."

See also *Kansas v. Colorado,* 185 U. S. 125 and 206 U. S. 46; *Connecticut v. Massachusetts,* 282 U. S. 660, 669; *Alabama v. Arizona,* 54 Sup. Ct. Rep. 399 (decided Feb. 5, 1934).

II.

THE PROPOSED TESTIMONY WOULD NOT BE ADMISSIBLE IN EVIDENCE, AND THE COURT SHOULD NOT COMPEL THE TAKING OF TESTIMONY WHICH IT CANNOT RECEIVE UNDER ESTABLISHED RULES OF EVIDENCE.

THE COLORADO RIVER COMPACT.

1. The proposed testimony would not be admissible to show the meaning and intent of the Colorado River Compact.

First, As between the states that have approved the Colorado River Compact, that Compact constitutes a treaty. Within each of the states it constitutes an irrevocable statute binding alike upon the state and its citizens. In construing the provisions of that Compact, the rules of construction applicable to treaties and statutes prevail. Under these rules, discussed later with reference to the Boulder Canyon Project Act, parol evidence is not admissible.

The states have surrendered, by the Constitution, their inherent rights to make treaties (Art. 1, sec. 10, Cl. 1). They are permitted, however, with the consent of Congress, to enter into compacts or agreements (Art. 1, Sec. 10, Cl. 3). Such instruments by whatever name, when lawfully made, are instruments of sovereignty. *Poole, et al., v. The Lessee of Fleeger, et al.,* 11 Peters 185-209; *Rhode Island v. Massachusetts,* 12 Peters 657-725; *Virginia v. Tennessee,* 148 U. S. 503; *Couch v. Tennessee,* (Supreme Court, Tennessee), 203 S. W. 831; *Sims v. Irvine,*

3 Dallas, 425; *Marlatt v. John Silk, et al.,* 11 Peters, page 1.

In this case consent and approval of Congress was given and the instrument became a treaty between six states and the United States. It is political in character and cannot be altered judicially. It cannot be changed or modified without approval of the legislative bodies of all of the high contracting parties. It is an instrument of greatest dignity, "deposited in the archives of the Department of State of the United States of America" (Art. XI; bill, pp. 23-24).

Second, quite aside from the inadmissibility of this type of testimony in interpretation of a statute, it is clear that it would be inadmissible in construction of the compact, considered solely as a contract. *DeWitt v. Berry,* 134 U. S. 306. Cf. *Burnes v. Scott,* 117 U. S. 582. *Northern Assurance Co. v. Grand View Building Asso.,* 183 U. S. 308, 318. It does not explain the Compact; it contradicts the instrument and the statutes which ratified it. No ground for an exception to the parol evidence rule is alleged.

No ambiguity on the face of article III(b) is alleged; to the contrary, the bill admits (p. 10)

> "The term Lower Basin was used to designate those parts of the States of Arizona, California, Nevada, New Mexico, and Utah within and from which waters naturally drain into the Colorado River system below Lee Ferry and also all parts of states located without the drainage area of the Colorado River system which then or thereafter should be beneficially served by waters from the system below Lee Ferry."

This is not a case where the contemporary construction given by the negotiators is sought, or could be sought, in order to resolve an ambiguity in the language they used. It is admitted that they used the words "Lower Basin" deliberately, and intentionally defined them in article II(g).

But it is said that they agreed that, at some future time, by agreement among the states of the Lower Division, there should be earmarked for Arizona the allocation made by article III(b) to the Lower Basin. Thus the bill, while claiming that it was agreed "that said one million acre feet was to be used exclusively by and for the State of Arizona" (p. 13), and alleging certain reasons why such a result was fair, states (p. 13):

> " * * * it was agreed that in view of the fact that no appropriation or allocation of water had otherwise been made by said compact directly to any State, the one-million acre feet for the State of Arizona should be included in said compact by an allocation for the Lower Basin. * * *"

It is not alleged that Arizona has relied on the inducement of the alleged parol agreement in performing any act to her prejudice. It is alleged (bill, p. 14) that her representatives stated that they "would accept said compact" if the alleged agreement were made, "otherwise they would refuse to accept said compact", and while Arizona's negotiator signed the final draft, on p. 24 it is stated that Arizona did not ratify the Compact. Thus Arizona is not bound by the Compact or anything arising out of the negotiation therefor. It is not explained why the other parties to the alleged oral bargain can

be charged by it if she is not. If such a bargain was made, Arizona was not induced by it to ratify the Compact nor does she allege any other action taken on the faith of the supposed understanding.

Citation scarcely is necessary to demonstrate that parol testimony, under these circumstances, is not admissible to vary the Colorado River Compact, even considered as a contract and aside from its statutory effect.

An interstate compact in addition to its status as a treaty and a statute, is a contract: *Green v. Biddle,* 8 Wheat 1; *Poole v. Fleeger,* 11 Pet. 185; *Virginia v. Tennessee,* 148 U. S. 503; *Wharton v. Wise,* 153 U. S. 155.

Reformation of Articles II(g) and III(b) is not prayed, nor could such reformation be sought by Arizona. She is still a stranger to and unaffected by the Compact. (*Arizona v. California,* 283 U. S. 423) The Compact is not subject to reformation by judicial process (*Virginia v. Tennessee,* 148 U. S. 503). To make such a reformation would constitute the exercise of political power.

Third, The alleged understanding among the negotiators, if relied upon as a separate agreement, was not ratified by their respective legislatures.

The defendants' representatives were negotiators, not plenipotentiaries. The Act of Congress authorizing the negotiation of the Compact (42 Stat. 171; bill, p. 8) specifically stipulated:

> "Provided, that any such compact or agreement shall not be binding or obligatory upon any of the parties thereto unless and until the same shall have been approved by the legislature of

each of said States and by the Congress of the United States."

The State statutes authorizing the negotiation of the Compact also stipulated that ratification should be required: Cf. Arizona, Sess. L, 1921, ch. 46, p. 53; California, Stat. 1921, ch. 88, pp. 85, 86; Colorado, Laws 1921, ch. 246, pp. 811-815; Nevada, Laws 1920-21, ch. 115, pp. 190-191; New Mexico, Laws 1921, ch. 121, pp. 217-220; Utah, Laws 1919-1921 ch. 68, p. 184, Wyoming, Laws 1921 ch. 120, pp. 166-167.

The Compact itself provided (Art. XI, p. 23 of Bill):

> "This compact shall become binding and obligatory when it shall have been approved by the legislature of each of the signatory States and by the Congress of the United States."

In fact, Arizona alleges (bill, p. 24):

> "That by the terms of said compact it was to be binding when it had been ratified and approved by the legislatures of the several States and by the Congress of the United States".

The Colorado River Compact is an agreement among States, not among their negotiators: among their legislatures, and not among the "framers and signers" of the instrument. Arizona admits that her negotiator, Mr. Norviel, formally signed the Compact itself, but denies, rightly, that she is bound thereby. Nevertheless, without accepting any burden under the Compact she contends that she is entitled to the benefit of alleged preliminary agreements by negotiators of others, whose authority was no greater

than that of Mr. Norviel. Testimony of what any negotiator did and said will not be admissible to charge the defendants with any obligation not expressed on the face of the Compact as ratified. Neither can Arizona base any future cause of action upon such alleged oral agreement to make a supplementary Compact, because: (1) the proposed Compact never was made (p. 24), and (2) to enforce the making of such a Compact would require of this court the exercise of political as distinguished from judicial power. This, the court has consistently refused to do. (*Georgia v. Stanton,* 6 Wall. 50; *Massachusetts v. Mellon,* 262 U. S. 447, 483; *New Jersey v. Sargent,* 269 U. S. 328, 332).

THE BOULDER CANYON PROJECT ACT.

2. The proposed testimony would not be admissible in construction of the Boulder Canyon Project Act.

The interpretation of the Boulder Canyon Project Act is a matter of statutory construction. It is not alleged that Congress approved the alleged collateral bargain, or intended to adopt it, or knew of its existence. Arizona alleges that the witnesses named in the bill alone know of the alleged agreement (Bill p. 68). Obviously if this be true the Congress cannot be said to have known of it or acted with reference thereto. It is alleged that Congress authorized in the Project Act an agreement among Arizona, California, and Nevada (sec. 4a; bill, p. 31), but this was admittedly an authorization for a new agreement, not a recital of an old one. No ambiguity in the statute is alleged. As said in *Caminetti v. U. S.,* 242 U. S. 470, 485:

> "Where the language is plain and admits of no more than one meaning the duty of interpretation does not arise and the rules which are to aid doubtful meanings need no discussion".

Compare *Wisconsin R. R. Comm. v. C. B. & Q. R. R.*, 257 U. S. 563, 589; *Penna. R. R. Co. v. International Coal Mining Co.*, 230 U. S. 184; *Mackenzie v. Hare*, 239 U. S. 299, 308; *Adams Express Co. v. Kentucky*, 238 U. S. 190, 199.

But even if Congress intended to subject the United States to a compact differing from the face of the agreement before it, that intent can be shown, if at all, only by reference to the legislative history of the Act. The intent of Congress in 1928 cannot be shown by proof of what was said in Santa Fe or other cities in 1922. It is not alleged that the agreement was brought before Congress in any manner competent to be shown in aid of construing a statute, either in the form of a committee report: *Duplex Co. v. Deering*, 254 U. S. 443; *Binns v. U. S.*, 194 U. S. 486, 495; *Holy Trinity Church v. U. S.*, 143 U. S. 457, 464; *Johnson v. Southern Pacific Co.*, 196 U. S. 1, 20; *U. S. v. Coca Cola Co.*, 241 U. S. 265, 282; *Wisconsin R. R. Comm. v. C. B. & Q. R. Co.*, 257 U. S. 563, 589; *Caminetti v. U. S.*, 242 U. S. 470, 490; *Lapina v. Williams*, 232 U. S. 78, 90; *Bate Refrigerating Co. v. Sulzberger*, 157 U. S. 1, 42; *Cramp & Sons v. Curtis Turbine Co.*, 246 U. S. 28, 37; *Lewis Publishing Co. v. Morgan*, 229 U. S. 288, 312; or in a supplemental report on the floor by a committee member in charge of the bill: *Duplex Co. v. Deering*, 254 U. S. 443, 475; *Binns v. U. S.*, 194 U. S. 486, 496; *Penna. R. R. Co. v. International Coal Co.*, 230 U. S.

184, 198, 199; *U. S. v. Coca Cola Co.*, 241 U. S. 265, 281; *U. S. v. St. P. M. & M. Ry. Co.*, 247 U. S. 310, 318; *Wisconsin R. R. Comm. v. C. B. & Q. R. Co.*, 257 U. S. 563, 589; or in a statement on the floor by a member of a conference committee appointed following disagreement of the two houses; *U. S. v. Trans-Missouri Freight Assn.*, 166 U. S. 290, 317; *Blake v. National Banks*, 23 Wall. 307, 317; or in amendments considered during debate on the bill: *Blake v. National Banks*, 23 Wall., 307, 317; *Johnson v. Southern. Pacific Co.*, 196 U. S. 1, 20; *Penna. R. R. Co. v. International Coal Co.*, 230 U. S. 184, 198; *The Five Per Cent Discount Cases*, 243 U. S. 97, 107; *U. S. v. Coca Cola Co.*, 241 U. S. 265, 281; *U. S. v. Burr*, 159 U. S. 78, 85; *Lewis Publishing Co. v. Morgan*, 229 U. S. 288, 309, 312; *U. S. v. Alexander*, 79 U. S. 177; *Dunlap v. U. S.*, 173 U. S. 65, 75; or in a message of the President: *Johnson v. Southern Pacific Co.*, 196 U. S. 1, 19; or in a communication from the head of a department: *Dunlap v. U. S.*, 173 U. S. 65, 75; *U. S. v. Union Pacific R. R. Co.*, 91 U. S. 72, 90; nor is it claimed that the alleged agreement was brought before Congress by any other of the methods by which extraneous matters may be shown in interpretation of a statute or at all. And not even the report of the Committee itself may be resorted to for the purpose of construing a statute contrary to its plain terms. *Penna. R. R. Co. v. International Coal Co.*, 230 U. S. 184, 199, citing cases; *R. R. Comm. v. Chicago, B. & Q. Ry. Co.*, 257 U. S. 563, 589.

CONDITIONS ON USE OF PUBLIC LANDS.

3. The proposed testimony would not be admissible in interpretation of the conditions imposed on the use of public lands by the Boulder Canyon Project Act. Aside from the question of statutory construction, the Court has already stated, in *Arizona v. California,* 283 U. S. 423, 464:

> "Arizona has, of course, no constitutional right to use, in aid of appropriation, any land of the United States, and it cannot complain of the provision conditioning the use of such public land. Compare *Utah Power & Light Co. v. United States,* 243 U. S. 389, 403-5."

If Arizona may not complain of the conditioning of the use, it may not complain of the form of the condition.

THE AGREEMENT BETWEEN THE UNITED STATES AND CALIFORNIA.

4. The proposed testimony would be inadmissible in interpretation of the legislative agreement between the United States and California limiting California's use of water.

The agreement between the United States and California is solely one between their legislatures; it was never negotiated and signed, like a contract, but appears only in reciprocal legislation of the two sovereigns.

What has been said about admissibility of evidence in construction of the Boulder Canyon Project Act applies to the statute of California (bill, p. 53). It is not alleged that Congress had knowledge of the al-

leged collateral agreement regarding article III(b) when it passed the Boulder Canyon Project Act, or that it intended to require that the statute of California (sec. 4a; bill, p. 30) refer to a compact differing from the face of the Compact to which the proposal of Congress referred, or that the California legislature intended to accept a proposal other than that so put before it.

Proof of what negotiators said in Santa Fe or other places in 1922 is not part of the legislative history of a bill enacted in Washington in 1928 or of another bill enacted in Sacramento in 1929. Again we may mention Arizona's allegation (bill, p. 68) that the negotiators alone knew of the agreement.

"RELATIVE RIGHTS"

5. The proposed testimony would not be admissible in any action to establish the relative rights of Arizona and the defendants in the waters of the Colorado River System.

As among the six parties to the Compact and the United States, their relative rights and duties are fixed by the Compact; they are content with it as it stands, and seek no judicial construction of it. As between Arizona and any of the parties to the Compact, the instrument is not controlling.

Admittedly "it may be years before any waters are taken from said river under said contracts, or the rights of Arizona therein are interfered with" (bill, p. 68), and it is not apparent that what was said in 1922 will aid this Court in determining the issue as then presented. If and when an action shall be brought, say in 1939 or 1959, it

will be determined by the facts and law as then found to exist. Cf. *Kansas v. Colorado,* 206 U. S. 46, 98; *Missouri v. Illinois,* 200 U. S. 496; *Wyoming v. Colorado,* 259 U. S. 419; *New York v. Illinois,* 274 U. S. 488; *Wisconsin v. Illinois,* 278 U. S. 367; 281 U. S. 179; *Connecticut v. Massachusetts,* 282 U. S. 660, 671; *Arizona v. California,* 283 U. S. 423. What certain negotiators may have said in 1922 cannot give rise to any equities in favor of Arizona or against any other state. Arizona does not allege that the events of 1922 initiated an appropriation as against any other State, or that she can acquire any right against these defendants other than by priority of appropriation. Cf. *Wyoming v. Colorado,* 259 U. S. 419, 470, 471, and cases cited.

If this or any Court had the power to, and should in some future action, modify the plain terms of the Compact in accordance with Arizona's contentions, the Compact would still be an agreement only among the parties to it, in which Arizona would have no more interest than she has in the Compact as written. She can appropriate water in the face of the instrument as it now stands, as well as she could under a judicially modified compact.

This Court in no event will make declaratory decrees. *Arizona v. California,* 283 U. S. 423, 464; *Alabama v. Arizona,* 54 Sup. Ct. R. 399. Testimony which looks only to a declaratory ~~can lead only to an ineffective~~ decree should not be taken. It is not alleged that, if the facts claimed by Arizona were proved by the proposed testimony, they would establish a cause of action against any defendant, or a defense against a future action by any present defendant.

The allegation that the negotiators agreed that a Nevada-California-Arizona Compact, to be made later, should provide that all III(b) water should go to Arizona, is patently insufficient. The evidence of the supposed agreement, if fully supporting this allegation, would not entitle Arizona to specific relief in this or any Court compelling the other States to make and ratify such a Compact. That, as we have seen, would call for the exercise of political power.

EVIDENCE WHICH CANNOT BE RECEIVED SHOULD NOT BE ORDERED TAKEN.

6. Since the proposed testimony cannot be received under established rules of evidence it should not be taken. If taken, there is no assurance that it will not be offered in some future action in an inferior tribunal, which will regard this Court's order herein as foreclosing the question of admissibility. The question of the admissibility of the evidence sought to be perpetuated is squarely before the court. The issues to which the evidence is addressed are stated in the bill. (pp. 67-68) If the proposed testimony is not material and competent with reference to these issues, this proceeding must fail. The ruling of the court herein will be regarded as conclusive as to the materiality and competency of evidence offered in connection with the issues set up in the bill, at least so far as inferior courts are concerned. It is to be noted that the evidence sought to be perpetuated is intended to be available *"in any and all future litigation"*, (bill, p. 70), involving construction of the various documents involved herein, between these parties or some of them.

The defendants would be burdened without purpose. The mere order of the court herein directing the recording of testimony would cast an utterly unwarranted doubt upon the meaning of the compact; a doubt which, as appears by the bill, could not be settled for many years. Any judicial recognition of the existence of such a cloud would have far reaching effects.

For the last decade and at the present time works of great magnitude have been and are going forward, government funds and the funds of numerous public corporations have been expended, communities are in process of development, all based upon the stability of the Santa Fe Compact as written. (See Reports of the Secretary of the Interior for 1930, pp. 22, 24, 76, 77; 1931, pp. 22, 24, 99, 100; 1932, pp. 11, 15, 95, 96; 1933, pp. 6, 35, 36.) It is no answer to the objections hereby presented that the mere recordation of inadmissible testimony can do no harm. If the impression is created that unambiguous terms of the Compact can be modified by, or construed with reference to, oral agreements made during negotiations and known only to a limited number of witnesses, a cloud will be cast over these projects until the testimony is ultimately weighed by the court; and "it may be years" (bill, p. 68) before that "judicial determination" is made.

III.

THE UNITED STATES IS AN INDISPENSABLE PARTY, AND THE BILL SHOULD NOT BE RECEIVED IN THE ABSENCE OF CONSENT BY THE UNITED STATES TO BE SUED.

The United States would be doubly affected by the proposed testimony. First, the Boulder Canyon Project Act specifically subjects the United States to the control of the Compact (sec. 8a, bill, p. 42) sec. 13b; bill, p. 48) in building and operating works title to which will rest in the government (sec. 6, bill p. 39) for the construction of which the expenditure of $165,000,000 was authorized (sec. 3; bill, p. 29) and in the disposition of stored waters (sec. 5; bill, p. 33), including contracts for the delivery of water which are now in force (bill, p. 63). Second, the United States and California are parties to a legislative agreement covering the use of water in California (bill, p. 53). Revenues to the United States from disposition of this water are part of the revenues required by statute for amortization of the cost of Boulder Dam (sec. 4b; bill, p. 4b) and the water delivery contracts must be for "permanent service" (sec. 5; bill, p. 34) Further, the use of public land for access to the Colorado River is likewise subject to the Compact (sec. 13c; bill, p. 48). It is plain that the United States, as owner of a dam and other property whose use is controlled by the Compact, must be heard in any proceeding affecting the "purpose and meaning" of the Compact. *Belknap v. Schild,* 161 U. S. 10; *Goldberg v. Daniels,* 231 U. S. 218; *International Postal Supply Co. v. Bruce,* 194 U. S. 601, 605; *Morrison v. Work,* 266 U. S. 481.

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Likewise the United States, as party to a separate bilateral agreement with California, must be heard in any proceeding purporting to affect California, the other party, by testimony affecting the meaning of the agreement. The United States and not the nominal defendant, the Secretary of the Interior, is the real party in interest. Cf. *Minnesota v. Hitchcock,* 185 U. S. 373, 387; *Oregon v. Hitchcock,* 202 U. S. 60, 68, 69; *Louisiana v. Garfield,* 211 U. S. 70, 78; *Naganab v. Hitchcock,* 202 U. S. 473; *New Mexico v. Lane,* 243 U. S. 52.

If a bill is subject to dismissal because of absence of the United States, the bill should not be received in the first instance. *Louisiana v. McAdoo,* 234 U. S. 627.

The United States has not consented to be sued, and cannot be sued without its consent even by a State. *Kansas v. United States,* 204 U. S. 331, 342.

The defendants would be adversely affected if the cause were allowed to proceed without the United States. It would be inequitable to compel the taking of testimony which, if admissible at all, would be urged to control their use of water of the Colorado River system but which could not affect the United States in its disposition of such water, as, for instance, by treaty with Mexico. It will be borne in mind that the Compact does not allocate the whole flow of the river, but leaves an unapportioned surplus, and that the United States is free to dispose of surplus waters by international agreement. (Compact, art III(c); bill, p. 18; Boulder Canyon Project Act, sec. 20; bill, p. 52.) The whole purpose of the bill is to lay a foundation for showing that a part of

the water now contracted for by California defendants is such surplus water. The defendants, therefore, have a direct interest in the question of whether the United States is present in these proceedings.

CONCLUSION.

It is respectfully submitted that the motion for leave to file the bill should be denied.

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for Palo Verde Irrigation District.
CHAS. L. CHILDERS,
for Imperial Irrigation District.
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C. L. BYERS, *City Attorney.*
PHIL D. SWING,
for the City of San Diego.
THOMAS WHELAN,
PHIL D. SWING,
for the County of San Diego.

FILE COPY

IN THE

Supreme Court of the United States

October Term, 1933

No. ..... (Original)

STATE OF ARIZONA, *Complainant,*

vs.

STATE OF CALIFORNIA, STATE OF COLORADO, STATE OF NEVADA, STATE OF NEW MEXICO, STATE OF UTAH, STATE OF WYOMING, HAROLD L. ICKES, Secretary of the Interior of the United States, PALO VERDE IRRIGATION DISTRICT, a public corporation of the State of California, IMPERIAL IRRIGATION DISTRICT, a public corporation of the State of California, COACHELLA VALLEY COUNTY WATER DISTRICT, a public corporation of the State of California, METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, a public corporation of the State of California, CITY OF LOS ANGELES, a municipal corporation of the State of California, CITY OF SAN DIEGO, a municipal corporation of the State of California, and COUNTY OF SAN DIEGO, a public corporation of the State of California, *Defendants.*

Joint and Several Return of Defendant States, Colorado, Nevada, New Mexico, Utah and Wyoming, to Rule to Show Cause Why Leave Should Not Be Granted the State of Arizona to File Bill to Perpetuate Testimony.

PAUL P. PROSSER,
Attorney General of Colorado,
GRAY MASHBURN,
Attorney General of Nevada,
E. K. NEUMANN,
Attorney General of New Mexico,
JOSEPH CHEZ,
Attorney General of Utah,
RAY E. LEE,
Attorney General of Wyoming,
Solicitors for respective Defendants.

COLO. QUICK PRINTING Company, Lawyers' Co-op. Bldg., Denver, Colo.

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Joint and Several Return of Defendant States, Colorado, Nevada, New Mexico, Utah and Wyoming, to Rule to Show Cause Why Leave Should Not Be Granted the State of Arizona to File Bill to Perpetuate Testimony.

Come now the defendant States, COLORADO, NEVADA, NEW MEXICO, UTAH and WYOMING, by their respective Attorneys General, and, for their joint and several Return to the Rule to Show Cause, issued herein under date of February 20, 1934, why leave to file a Bill to Perpetuate Testimony by complainant, State of ARIZONA, against said defendant States, among other defendants, should not be granted, aver:

Said defendant States, COLORADO, NEVADA, NEW MEXICO, UTAH and WYOMING, and each of them, have no objection to interpose, either severally or jointly, to the filing of the aforesaid Bill by complainant, State of ARIZONA, and to the taking of any competent, relevant and material testimony on the part of the witnesses therein named, or on the part of any of them, in order that the same may be perpetuated.

And in this behalf said defendant States, COLORADO, NEVADA, NEW MEXICO, UTAH and WYOMING, pray that, if the Court should determine that, under its Rules and in equity and good conscience the complainant, State of ARIZONA, is entitled to file the aforesaid Bill and to take competent, relevant and material testimony on the part of the witnesses therein named, or on the part of any of them, for the purpose of having the same perpetuated, the order therefor may save and protect the rights of these defendant States, COLORADO, NEVADA, NEW MEXICO, UTAH and WYOMING, in the following respects:

(1) That each of these defendant States may be specifically granted the right to cross-examine each and every witness whose testimony may be taken by the complainant, State of ARIZONA.

(2) That there may be specifically reserved to each of these defendant States the right to object to any of such testimony, either at the time of the taking thereof or at any time thereafter when the same might be presented to this Court, for such reasons and upon such grounds as may be specified by such defendant State;

(3) That the lawful costs incurred by these defendant States incident to the taking of such testimony be so apportioned and taxed as this Court may consider proper; and

(4) That the rights of these defendant States, COLORADO, NEVADA, NEW MEXICO, UTAH and WYOMING, may be otherwise safeguarded in the premises, in such manner and to such extent as this Court may deem to be consonant with equity and justice.

Respectfully submitted,

PAUL P. PROSSER,
Attorney General of Colorado,

GRAY MASHBURN,
Attorney General of Nevada,

E. K. NEUMANN,
Attorney General of New Mexico,

JOSEPH CHEZ,
Attorney General of Utah,

RAY E. LEE,
Attorney General of Wyoming,

Solicitors for respective Defendants.

PROOF OF MAILING COPY OF RETURN.

STATE OF COLORADO, }
CITY AND COUNTY OF DENVER } ss.

PIERPONT FULLER, JR., being first duly sworn, on his oath deposes and says that on the 22nd day of March, A. D. 1934, he deposited in the United States Post Office in the City and County of Denver, Colorado, in a sealed envelope with postage prepaid by registered mail, a true printed copy of the foregoing Return to the Rule to Show Cause, addressed to Arthur T. LaPrade, Attorney General of Arizona, Attorney General's Office, Phoenix, Arizona.

PIERPONT FULLER, JR.

Subscribed and sworn to before me this 22nd day of March, A. D. 1934.

My commission expires August 7, 1934.

ELIZABETH D. PATTEN,
Notary Public.

(SEAL)

FILE COPY

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In the Supreme Court of the United States

OCTOBER TERM, 1933

STATE OF ARIZONA, COMPLAINANT

v.

STATE OF CALIFORNIA, STATE OF COLORADO, STATE OF NEVADA, STATE OF NEW MEXICO, STATE OF UTAH, STATE OF WYOMING, HAROLD L. ICKES, SECRETARY OF THE INTERIOR OF THE UNITED STATES, PALO VERDE IRRIGATION DISTRICT, A PUBLIC CORPORATION OF THE STATE OF CALIFORNIA, IMPERIAL IRRIGATION DISTRICT, A PUBLIC CORPORATION OF THE STATE OF CALIFORNIA, COACHELLA VALLEY COUNTY WATER DISTRICT, A PUBLIC CORPORATION OF THE STATE OF CALIFORNIA, METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, A PUBLIC CORPORATION OF THE STATE OF CALIFORNIA, CITY OF LOS ANGELES, A MUNICIPAL CORPORATION OF THE STATE OF CALIFORNIA, CITY OF SAN DIEGO, A MUNICIPAL CORPORATION OF THE STATE OF CALIFORNIA, AND COUNTY OF SAN DIEGO, A PUBLIC CORPORATION OF THE STATE OF CALIFORNIA, DEFENDANTS

RESPONSE OF DEFENDANT HAROLD L. ICKES TO THE RULE TO SHOW CAUSE, AND BRIEF IN SUPPORT THEREOF

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RESPONSE OF THE DEFENDANT HAROLD L. ICKES TO THE RULE TO SHOW CAUSE

Now comes Harold L. Ickes, Secretary of the Interior, one of the defendants in this cause, and

for his response to the rule to show cause issued by this Court on February 20, 1934, says that the motion for leave to file the bill to perpetuate testimony should not be granted, for the following reasons:

1. The matters set out in the proposed bill show that the contemplated future suit, in aid of which the leave is asked to file this Bill, will relate not only to the property and rights of the United States, but to the carrying out by it of governmental functions. The suit is, therefore, in effect, one against the United States and to which it is a necessary party. The United States has not consented to be sued on such a cause of action.

2. The testimony sought to be perpetuated relates to certain conferences held, and understandings said to have been reached, in Santa Fe, New Mexico, in 1922. (Bill, pp. 11–14.) It is asserted that the same will be material upon the construction of three documents (Bill, pp. 66–69), to wit:

(a) The Colorado River Compact, signed at Santa Fe, November 24, 1922, especially Article III (b) thereof;

(b) The Boulder Canyon Project Act, approved December 21, 1928, c. 42, 45 Stat. 1057–1066, especially subdivision (2) of Section 4 (a) thereof; and

(c) The Act of the legislature of the State of California, approved March 4, 1929 (Cal. Stats. of 1929, c. 16).

Said testimony, we submit, can never become admissible or competent upon the interpretation of any of said documents, because:

(a) As to the Colorado River Compact, the provisions of said Article III (b), read in connection with Article II (g), are clear and unambiguous, and not subject to amendment or interpretation by prior oral understandings.

(b) As to the Boulder Canyon Project Act the same is an act of Congress approved in 1928, and not subject to interpretation or amendment by oral understandings had, by gentlemen not members of the Congress, in 1922.

(c) As to the Act of California, the same was passed in 1929, is in the language of the Boulder Canyon Project Act, is directed to be construed in accordance with the latter (Sec. 2) and is not subject to interpretation or amendment by oral understandings had, by gentlemen not members of the legislature of California, in 1922.

3. Substantial claims of Arizona can arise in future only if "the stored water is used in such a way as to interfere with the enjoyment by Arizona, or those claiming under it, of any rights already perfected or with the right of Arizona to make additional legal appropriations and to enjoy the same." (283 U.S. 423, 464.) If and when such claims arise, the rights of all the parties will depend on then existing conditions, and not on the under-

standing said to have been reached in 1922 but which was never signed or ratified. (Bill, p. 24.)

Wherefore this defendant prays that the motion for leave to file the proposed bill be denied, and the rule discharged.

HAROLD L. ICKES,
Secretary of the Interior.
By J. CRAWFORD BIGGS,
Solicitor General.

APRIL 1934.

BRIEF ON BEHALF OF DEFENDANT HAROLD L. ICKES, IN SUPPORT OF HIS RESPONSE TO THE RULE

JURISDICTION

The motion was submitted February 14, 1934. The rule to show cause issued February 19, returnable April 2.

Jurisdiction is asserted under the Constitution of the United States, Article III, Section 2, Clauses 1 and 2. There is no applicable statute.

QUESTIONS PRESENTED

1. Has this Court jurisdiction, in a proper case, to entertain an original bill to perpetuate testimony?

2. Is the testimony offered here admissible or competent for any of the purposes suggested?

3. Is this in real effect a suit against the United States?

CONSTITUTION AND STATUTES INVOLVED

Constitution of the United States, Article III, Section 2, Clauses 1 and 2.

R.S. Sec. 866 (U.S.C., Title 28, Sec. 644):

> * * * and any circuit court, (district court in U.S.C.) upon application to it as a court of equity, may, according to the usages

> of chancery, direct depositions to be taken in perpetuam rei memoriam, if they relate to any matters that may be cognizable in any court of the United States * * *.

The Boulder Canyon Project Act, approved December 21, 1928, c. 42, 45 Stat. 1057–1066. (This Act is printed *in extenso* in the Bill, pp. 25–52.)

An Act to limit the use by California of the waters of the Colorado River, approved March 4, 1929, Statutes of California, 1929, c. 16. (This Act is likewise printed *in extenso* in the Bill, pp. 53–56.)

STATEMENT

This is a motion for leave to file an original bill to perpetuate testimony.

The response of the Secretary of the Interior, filed with this brief, resists the motion on two grounds: (1) that the testimony sought to be perpetuated cannot become admissible or competent on any of the matters to which it is directed; (2) that the suit is in reality against the United States, which has not consented to be sued upon this cause of action.

The allegations of the bill may be summarized as follows:

The Colorado River Compact (Bill, pp. 14–24) between seven States was signed at Santa Fe, November 24, 1922 (p. 24). Article III (a) provided:

> ARTICLE III. (a) There is hereby apportioned from the Colorado River system in perpetuity to the upper basin and to the

> lower basin, respectively, the exclusive beneficial consumptive use of 7,500,000 acre-feet of water per annum, which shall include all water necessary for the supply of any rights which may now exist.

The "upper basin" and the "lower basin" are defined in Article II(f) and (g) (pp. 16, 17).

Arizona did not ratify the compact (p. 24) but the other States and the United States have done so (p. 24). In 1928 the Congress passed the Boulder Canyon Project Act (approved December 21, 1928, c. 42, 45 Stat. 1057–1066). This Act is set out *in extenso* in the Bill (pp. 25–52). By it the Congress authorized the construction of the Boulder Dam and other works (Sec. 1), for the purposes set out, at a cost of not exceeding $165,000,000 (Sec. 2 (b)), for which the United States is to be reimbursed, with interest, from the expected revenues, within fifty years of the completion of the works (Sec. 4 (b)). Title to the dam and works is to remain in the United States, which is also to control and operate them (Sec. 6). As to the division of the water, the Colorado River Compact shall control. (Secs. 1, 4 (a), 8 (a), 13 (a), (b), and (c).)

The "lower basin" in the Colorado River Compact consists of portions of five States (Article II (g), Bill, p. 17), and by the compact there is no subdivision of the 7,500,000 acre-feet of water apportioned to the lower basin by Article III (a).

The Boulder Canyon Project Act (Sec. 4 (a)) limits California's taking from this water to 4,400,000 acre-feet, and to this limitation California has agreed. (Cal. Stats., 1929, c. 16, Bill, pp. 53–56.) Congress suggested (Sec. 4 (a), second paragraph) that the balance of these waters be apportioned 300,000 acre-feet to Nevada and 2,800,000 acre-feet to Arizona, but this suggested further compact was not made. (Bill, pp. 63–64.)

Article III (b) of the Colorado River Compact (Bill, p. 18) reads as follows:

> (b) In addition to the apportionment in Paragraph (a), the lower basin is hereby given the right to increase its beneficial consumptive use of such waters by 1,000,000 acre-feet per annum.

It is said by Arizona that this provision was inserted to make good to Arizona the loss occasioned to her by the inclusion in the totals of the waters of the Gila River, which were already largely appropriated and in use in Arizona, and which entered the Colorado too far down to be beneficial elsewhere (Bill, pp. 11–13). It is said, therefore, that the agreement was that all the waters of Article III (b) should go to Arizona, and that a supplemental compact, between California, Nevada, and Arizona, should be made to that effect (pp. 13–14). The testimony sought is that of the survivors of those who attended these discussions (pp. 66–67). The supplemental contract was not made (p. 24).

The Bill does not state whether any draft of it was ever put in writing.

The Boulder Canyon Project Act nowhere refers expressly to Article III (b) of the Colorado River Compact, and makes no express provision for the waters mentioned in that article. Instead Congress proposed (Sec. 4 (a), second paragraph) an agreement between Arizona, California, and Nevada, giving Arizona 2,800,000 acre-feet of the Article III (a) waters, one half of all surplus unapportioned waters, and the exclusive beneficial use of the waters of the Gila River. But this agreement was not made (Bill, pp. 63–64).

The former Secretary of the Interior promulgated certain regulations for the delivery of water (Bill, pp. 56–63) and entered into certain contracts, calling for delivery to users in the State of California of 5,362,000 acre-feet per year (p. 63). This exceeds California's original assignment of the Article III (a) waters by 962,000 acre-feet. Arizona thinks that this excess must come from the 1,000,000 acre-feet of Article III (b), which she says belongs to her (p. 65). Complainant is informed and charges that the present Secretary of the Interior, the defendant in this cause, has continued the regulations promulgated by his predecessor and acknowledges the contracts which his predecessor made "to be valid and binding upon the United States" and proposes to perform them

(p. 64). At the time the bill is filed "no waters are being taken from the Colorado River system under the contracts hereinabove alleged, and no rights of the State of Arizona have as yet been interfered with" (p. 68), but Arizona fears that her waters may be taken in the future and desires to take the proof for use in case they are. Reference is made in that connection (p. 69) to the prior action and to its dismissal without prejudice. *Arizona* v. *California,* 283 U.S. 423. As to the exact purpose of the testimony sought, the bill alleges (Bill IV (m) and VI, pp. 67–68, 68–69):

> (m) That such testimony will be material in the anticipated cause and causes of action in determining the true meaning and intent of said Colorado River Compact, said Boulder Project Act and the conditions thereby attached to patents, grants, contracts, concessions, leases, permits, licenses, rights-of-way and other privileges from the United States and under its authority, and in determining the true purpose and meaning of the limitation of use in the State of California of waters of said Colorado River imposed by said Boulder Canyon Project Act and the act of the legislature of the State of California, herein set out, and the relative and respective rights of each of the parties hereto in and to the waters of said Colorado River and its tributaries and the use thereof and the burdens and restrictions imposed on such use.

VI

That the witnesses hereinbefore named alone know the facts herein stated and will be material and necessary witnesses in the prosecution of litigation, which this complainant will be compelled to institute in order to safeguard and protect the right of complainant and those claiming under it to the use of the waters of the Colorado River system and to carry out the true meaning and intent of the act of the legislature of the State of California and of the Boulder Canyon Project Act in limiting the use of the waters of the Colorado River system in said State.

SUMMARY OF ARGUMENT

I. The Government is of opinion that in a proper case this Court has jurisdiction to entertain an original bill to perpetuate testimony.

II. This is not a proper case, because the testimony sought could never become admissible or competent for any of the purposes stated in the Bill.

III. Assuming that the case were proper in other respects, the United States is a necessary party, and has not consented to be sued.

ARGUMENT

I

THE JURISDICTION

Since this seems to be the first occasion on which application to file a bill of this character has been

made in this Court, and since there is no statute and no rule that provides in words for such a suit, it may be proper to state the Government's views as to the jurisdiction.

Complainant's statement as to jurisdiction bases it directly on the Constitution: Article III, Section 2, clauses 1 and 2. The first question, therefore, is whether such a bill constitutes a "case in equity", or presents a "controversy" within the meaning of the Constitution.

A bill to perpetuate testimony is an ancient, well recognized, and independent head of equity jurisdiction. It is said to have been exercised in England at least as long ago as the reign of William and Mary, and is still exercised there, and it has been recognized and exercised in the United States both by State and the inferior Federal courts. Its existence, in the inferior Federal courts, is recognized by statute, and has been noted by this Court. *West* v. *Lord Sackville,* L. R. (1903) 2 Ch. 378; *Richter* v. *Union Trust Co.,* 115 U.S. 55; *Westinghouse Machinery Co.* v. *Electric Storage Battery Co.,* 170 Fed. 430 (C.C.A. 3d, 1909); *New York, etc., Coffee Polishing Co.* v. *N.Y. Coffee Polishing Co.,* 9 Fed. 578 (C.Ct.N.Y. 1881); Story: *Equity Jurisprudence,* 14th ed., Secs. 1957–1968; Foster: *Federal Practice,* 6th ed., Sec. 345; Encyclopedia of Pleading and Practice, Vol. 16, pp. 353–364; R.S. Sec. 866 (U.S.C., Title 28, Sec. 644). The provision in R.S. 866 (quoted *supra,* p. 5) derives from the Judiciary Act of 1789, 1 Stat. 90, Sec. 30.

It has been in force, in one form or the other, ever since.

The characteristics of the jurisdiction, as developed in these authorities, are these:

1. The sole purpose of the suit is to perpetuate the testimony sought, for use in later litigation. No additional relief is possible, and if any more is sought the bill is multifarious.

2. The jurisdiction is assumed to prevent a failure of justice resulting from the danger of the death of witnesses before the matter can be brought on for trial in an ordinary suit. From this it follows that:

3. The testimony must have bearing on a claim of legal right belonging to the plaintiff, which can be asserted by him, in the future, in some action, and must be such as would be admissible and competent in such an action.

4. It must be impossible for plaintiff to bring his other action now. If he could sue now upon the merits, and take the testimony in that case, there is no occasion to perpetuate it independently.

5. As applying to the Federal courts, of course, the testimony sought must relate to some matter otherwise within their jurisdiction.

The first question, therefore, is whether such a suit, where no relief is sought except to take the proof, no trial ever had, and no judgment ever entered, constitutes a "case" or "controversy" within the judicial power conferred by the Consti-

tution on the courts of the United States. *Muskrat* v. *United States,* 219 U.S. 346.

We have no doubt that it does. The jurisdiction was well recognized, as an independent head of chancery jurisdiction, at the time the Constitution was adopted. Such suits were well known at that time, and were historically within the class of cases in equity. The jurisdiction was provided for (as to the inferior Federal courts) in the first Judiciary Act, and those courts have never doubted that they had it. This Court has stated that they did. *Richter* v. *Union Trust Co.,* 115 U.S. 55. It, therefore, seems quite clear that a proceeding of this sort is properly a "case in equity" within the Constitution.

The next question is whether it requires a special statutory grant of jurisdiction. We think that it does not. In the *Westinghouse Machine* case, *supra,* the court said (170 Fed. 432):

> Since general chancery jurisdiction was vested in the federal courts by the Constitution itself (article 3, § 2), it follows that the provisions of Rev. St. § 866, in reference to Circuit Courts as courts of equity entertaining bills to perpetuate testimony, are but regulations or extensions of chancery jurisdiction in and to particular federal courts, and not the origin of such jurisdiction in federal courts generally. * * *

This seems to be a wholly accurate statement of the situation. It follows that where the underly-

ing controversy is within the original jurisdiction of this Court (because, as here, the plaintiff is a State) this Court has power, in a proper case, to entertain the bill and order the proof taken. The practice is no doubt indicated by Rule 5 of this Court.

II

Is This a Proper Case?

All the essentials exist, provided only that the testimony called for is admissible and competent on any of the matters claimed.

The underlying controversy is as to diversions of water from the Colorado River. Arizona has an interest in that, which she can assert by suit, under numerous authorities. Under the prior decision she may not bring that suit until

> the stored water is used in such a way as to interfere with the enjoyment by Arizona, or those claiming under it, of any rights already perfected or with the right of Arizona to make additional legal appropriations and to enjoy the same.

Arizona v. *California*, 283 U.S. 423, 464. The bill asserts (p. 68) that at the date of filing

> no waters are being taken from the Colorado River system under the contracts hereinabove alleged, and no rights of the State of Arizona have as yet been interfered with * * * and it may be years before any

> waters are taken from said river under said contracts, or the rights of Arizona therein are interferred with * * *.

The Bill asks no relief except that the testimony be perpetuated (pp. 4, 70).

The Bill is, therefore, proper if the testimony sought would be admissible and competent in the future suit proposed. Whether it would be is the question for decision.

The testimony sought relates to an agreement said to have been reached by the negotiators of the Colorado River Compact, but prior to its signature (bill, p. 14) as to the further disposition of the extra water for the lower basin mentioned in Article III (b), the alleged agreement being that that water should all go to Arizona, and that a further compact of three States should be made to that effect (pp. 13–14).

This agreement, if proved as alleged, obviously could have no effect as an agreement. The negotiators had no power to bind their States, nor the United States. Whatever they agreed to was dependent upon ratification by the States and by the Congress. This particular agreement not only was not ratified, but "was never negotiated or signed" (p. 24). Accordingly, it could have no effect as an agreement.

Arizona, therefore, and quite properly, does not claim such effect. What she does assert is that the testimony is material upon the meaning of the Colorado River Compact, the Boulder Canyon

Project Act, the conditions thereby attached to patents, grants, etc., from the United States, the meaning of the California statute, and generally upon the rights of all the parties in the waters of the river (Bill IV, (m) pp. 67–68).

As to the Colorado River Compact, it perhaps is proper to suggest that since Arizona has not ratified it (Bill, p. 24) she cannot claim thereunder, whatever its true meaning. But the compact has been, in substance, enacted as a law of the United States by the Boulder Canyon Project Act, and its provisions do affect the disposition of the waters of the Colorado River. Arizona may well say, therefore, that she has a stake in its true meaning.

The provision sought to be interpreted is this (Art. III (b), Bill, p. 18):

> (b) In addition to the apportionment in Paragraph (a), the lower basin is hereby given the right to increase its beneficial consumptive use of waters by 1,000,000 acre-feet per annum.

"Lower basin" as here used is defined by Article II (g) (Bill, p. 17) as follows:

> (g) The term "Lower Basin" means those parts of the States of Arizona, California, Nevada, New Mexico, and Utah within and from which waters naturally drain into the Colorado River system below Lee Ferry, and also all parts of said States located without the drainage area of the Colorado River system which are now or shall here-

> after be beneficially served by waters diverted from the system below Lee Ferry.

The interpretation claimed is that "lower basin" in Article III (b) should be read as "Arizona." In view of the clear language of Article II (g) that is impossible. It is not interpretation that is asked for, but a revision of the contract, or a supplemental contract which the parties never made.

The next document to be interpreted is the Boulder Canyon Project Act. The specific sections upon the meaning of which light is to be thrown are not indicated in the Bill, but no doubt they are those sections which refer to the Colorado River Compact (Secs. 1, 4 (a), 8 (a), 13 (a), (b), and (c)), and especially 4 (a), which operates to limit California's taking from the waters of the river. In the latter section there may be an ambiguity, for it is not wholly clear whether the "excess or surplus waters unapportioned by said compact" and of which California's taking must not exceed one half (Sec. 4 (a), first paragraph), are surplus waters after Article III (a) alone, or after III (a) plus III (b). The III (b) waters, as such, are nowhere directly referred to in the Act.

Assuming that there is a question for construction, it is in an Act of Congress, and this Court has often pointed out what aids may be resorted to to solve it. Reference is proper to reports of the Committees, including sometimes oral statements as to meaning made by the Committee Chairman

on the floor; but general debate in Congress on the very bill is regarded as an unreliable guide, and will generally not be resorted to. *Lapina* v. *Williams,* 232 U.S. 78, 90; *United States* v. *St. P. M. & M. R. Co.,* 247 U.S. 310, 316–319; *Duplex Printing Co.* v. *Deering,* 254 U.S. 443, 474–475. In this case it is proposed to interpret an Act of Congress passed in 1928 by what certain gentlemen, not members of the Congress, agreed to at a conference, in Santa Fe, in 1922. The effort is without reasonable basis.

As to the interpretation of the act of California the same principles apply.

As to the interpretation of the patents, grants, etc., from the United States, mentioned also in the Bill (p. 67), the reference is evidently to that provision of the Boulder Canyon Project Act (Sec. 13 (c)) which makes such grants subject to the Colorado River Compact. Interpretation of the conditions of each grant is merely a result of interpretation of the Compact, and if the latter cannot be subjected to interpretation by this testimony, then also the grants cannot.

It therefore seems quite clear that as to each of the documents concerned the testimony sought to be perpetuated can never become admissible or competent. If this is right, it ought not to be taken.

It is not intended to suggest that Arizona will never have a cause of action on the merits of the

underlying question. This Court has said she may have. *Arizona* v. *California,* 283 U.S. 423, 463–464. But that can happen only "in case the stored water is used in such a way as to interfere with the enjoyment by Arizona, or those claiming under it, of any rights already perfected or with the right of Arizona to make additional legal appropriations and to enjoy the same." Same, p. 464. Surely, if this happens, the rights of all the parties in these waters will depend, not on any oral understanding or gentlemen's agreement reached at Santa Fe in 1922, and never signed or ratified, but on the question whether, in the actual conditions as they shall then exist, the actual division of these waters is unlawful. That case will not depend on any legalistic claims on either side, but on the provisions of the controlling legislation and the considerations of equal and fair dealing between States, and actual beneficial uses of the water, which this Court has applied in all these cases. *Kansas* v. *Colorado,* 185 U.S. 125, 146; *Kansas* v. *Colorado,* 206 U.S. 46, 100; *Missouri* v. *Illinois,* 200 U.S. 496; *Wisconsin* v. *Illinois,* 278 U.S. 367, 281 U.S. 179; *Connecticut* v. *Massachusetts,* 282 U.S. 660, 669–673.

III

Is This a Suit Against the United States?

Since this Bill prays for no relief except to take and to record the proof, it may be thought that this suggestion is superfluous. But this suit is a mere

aid to another, and if the Court can see that that other, necessarily, will be one which the party cannot bring, the proof should not be taken.

It is difficult to speculate about a future lawsuit which is not before the court. Inspection of this Bill, however, shows that the future suit, to which it is an aid, must be to stop or to reduce the taking, for use in California, of water from the Boulder Dam. It will necessarily, if Arizona's claims are sound, strike down the contracts which the Bill asserts (p. 63) the United States has made, to deliver 5,362,000 acre-feet of water for use in California.

Under the Boulder Canyon Project Act the Government expects repayment out of these and other contracts, over a period of fifty years, of the whole cost of the dam and works. By Section 4 (b) of the Act the dam could not be built until contracts sufficient for that purpose were secured. It therefore seems quite clear that a suit against those contracts would concern directly the Government's property and revenues, and could not be maintained without its consent. *Louisiana* v. *McAdoo,* 234 U.S. 627; *New Mexico* v. *Lane,* 243 U.S. 52; *Wells* v. *Roper,* 246 U.S. 335.

CONCLUSION

It is therefore submitted that the motion for leave to file the Bill should be denied, and the rule discharged.

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APRIL 1934.

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No. (Original)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1933.

STATE OF ARIZONA, *Complainant,*

vs.

STATE OF CALIFORNIA, ET AL., *Defendants.*

CLOSING BRIEF OF DEFENDANTS THE METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, THE CITY OF SAN DIEGO AND THE COUNTY OF SAN DIEGO.

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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CLOSING BRIEF OF DEFENDANTS THE METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, THE CITY OF SAN DIEGO AND THE COUNTY OF SAN DIEGO.

INTRODUCTION.

We said in our opening brief that (1) no ambiguity exists in Article III(b) of the Colorado River Compact wherein certain water is allocated to the Lower Basin (this being the section sought by the bill to be interpreted); (2) that even if such ambiguity were found to exist it could not be resolved by

testimony relating to informal conversations between negotiators of the Compact but must be considered only in the light of matters before the legislatures of the respective states ratifying the Compact and before the Congress. We have pointed out that all of the phases of the problem mentioned in the Bill relate back to the Compact and that the testimony sought to be perpetuated relates solely to Article III(b) of that document and is in no way directed to or in aid of interpretation of the various other statutes and documents mentioned in the Bill, except in so far as they refer back to Article III(b) of the Compact.

We find upon examination of Arizona's brief that the allegations relating to the supposed collateral agreement concerning Article III(b) have been virtually forgotten; that the ambiguity now sought to be resolved lies in Article III(a) and relates to the question whether the Compact apportioned waters of the Colorado River System including its tributaries, or only apportioned waters of the main stream as at Lee Ferry; and that the discussion of Article III(b) makes the real targets the Boulder Canyon Project Act and the California Limitations Act of 1929. We shall point out in this brief that the basic theories of the Bill and of Arizona's brief are diametrically opposed. The bill says that the Gila and other tributaries were included in the Compact, but that Arizona is entitled to prove a parol bargain giving her 1,000,000 acre feet in return (Bill, pp. 11-13); the brief argues that the negotiators excluded the Gila and other tributaries and apportioned only main stream water (p. 10). The Bill specifies, as the sole

evidence offered for perpetuation, a conversation held in Santa Fe, New Mexico, in 1922, known only to the participants (Bill, p. 13, 68); the brief is concerned largely with statutes enacted six years later (Brief, pp. 12-19).

I.

THE COMPACT IS FREE FROM AMBIGUITY.

An examination of the allegations of the Bill offered to be filed by Arizona reveals, assuming as we must that such allegations are true, that the framers of the Compact said exactly what they intended to say and said it clearly and without ambiguity.

First, as to Article III(b): It is alleged (Bill, p. 13) that

> "* * * it was agreed that in view of the fact that no appropriation or allocation of water had otherwise been made by said compact directly to any State, the one million acre feet for the State of Arizona should be included in said compact *by an allocation for the Lower Basin.*"*

As appears by the language in the paragraph following the words just quoted, it was left to a supplemental compact, which has never been made, to give effect to the alleged agreement to give all such waters to Arizona (Bill, pp. 13 and 14). In other words, the allegation emphasizes the fact that the framers of the Compact said and intended to say that the "Lower Basin" should be the beneficiary of Article III(b). The alleged agreement to make an agree-

*All italics are supplied unless otherwise noted.

ment was never carried out and is, of course, not binding on any one.

Second, as to the claim (appearing for the first time in the brief filed by Arizona, page 10) that the Compact divides only main stream water and has no effect on tributaries: the allegations of the Bill defeat the theory presented in the Brief. The Bill alleges (Bill, pp. 11 and 12) that

> "A draft of the proposed compact, based on the inclusion of the Gila River and its tributaries within the definition of the Colorado River system and the division of the waters thereof between the upper basin and lower basin, as hereinbefore defined, was prepared and submitted to said conference. *The representatives of all the States and the United States except the Arizona delegation were in agreement as to the definition of the Colorado River system, including the Gila River and its tributaries,* and as to the division proposed, which substantially apportioned the waters of the Colorado River at Lee Ferry, the point selected as dividing the Upper Basin from the Lower Basin."

The Bill then goes on to allege that

> "The Arizona delegation refused and declined to accept the proposed Compact because of the inclusion of the Gila River and its tributaries without any compensating provision to the State of Arizona in lieu of the waters thereof * * *"

Again it is alleged in the Bill (p 13) that it was agreed

> * * * "that said one million acre feet apportioned by subdivision (b) of Article III of said Compact was intended for and should go to the State of Arizona to compensate for the

> waters of the Gila River and its tributaries being included within the definition of the Colorado River system * * *"

It is clear from the allegations of the Bill that the framers of the Compact in writing that document said exactly what they intended to say and apportioned waters of the Colorado River system inclusive of its tributaries, not main stream water only.

Turning to the Compact for demonstration of this point we find a specific definition of the words "Colorado River System" (bill, p. 16):

> "The term 'Colorado River system' means that portion of the Colorado River *and its tributaries* within the United States of America."

In Article III(a) (Bill, p. 17) it is provided that

> "there is hereby apportioned from the *Colorado River system* * * * to the Upper Basin and to the Lower Basin, respectively, the exclusive beneficial consumptive use of 7,500,000 acre-feet of water per annum."

Article III(b) (p. 18) refers to and allows to the Lower Basin one million acre-feet of "such waters", which can mean nothing other than the waters of the Colorado River System.

It is manifest that the framers of the Compact clearly intended to and did deal with the Colorado River System inclusive of its tributaries.

Nevertheless, and in contradiction of the Bill and the Compact, we find this statement in Arizona's Brief (p. 10):

> "In fact it seems to be apparent upon a consideration of the entire compact that the framers

> thereof were apportioning waters of the main stream of the Colorado River as at Lee Ferry. It must be borne in mind that all of the tributaries of the upper division, or upper basin, empty into the Colorado River above Lee Ferry and that the records of flow upon which the apportionment of the Colorado River Compact was made, were kept at Lee Ferry. It is the natural dividing point between the upper and lower basins, the point at which the waters of the upper basin have reached the main stream and the point at which record as to the total flow was obtainable at that time and now."

and again on page 11 of her Brief, Arizona says:

> "This certainly constitutes an ambiguity in the Colorado River Compact, which we submit can be resolved and reconciled only by recognition of the fact that the framers of the Compact intended that the 1,000,000 acre-feet per annum permitted to the lower basin by Article III(b) was not in the main stream at all, but was in the tributaries existing in the lower basin."

The only tangible point which Arizona urges in support of the idea that there is any ambiguity as to what waters were treated in the Compact is found in the fact that in Article III(d) the States of the Upper Division agree that they will not cause the flow of the river at Lee Ferry (obviously main-stream water plus all tributaries above that point) to be depleted below an aggregate of 75,000,000 acre-feet for any period of ten consecutive years. While it happens that the figure is ten times the annual apportionment of the waters of the entire system to the Lower Basin under Article III(a). the obligation

with reference thereto is totally different from the obligations created by Article III(a) and III(b). Article III(d) would be satisfied if the flow were to be depleted to 5,000,000 acre-feet during certain years but increased during others to compensate, so that the ten years' total would be brought up to 75,000,000 acre-feet. Not so the obligations of III(a); therein a certain annual apportionment is made which would not be satisfied by a long term average but must be met annually. The apportionment of waters of the "system", inclusive by specific definition of all tributaries in the United States, appearing in Article III(a) is in no wise affected or diminished by the long-term average requirement. Each of the obligations of Article III(a) and III(d) can be satisfied without conflict. The average of the 75,000,000 acre-foot guarantee is said by Arizona to be identical with the lower basin's annual apportionment under Article III (a). The compact's language demonstrates the contrary. The apportionment in Article III (a) is of "the exclusive beneficial consumptive use of 7,500,000 acre-feet of water per annum." Consumptive use is, as said for instance in the Project Act, diversions less returns to the river (sec. 4; Bill, p. 30). Even if all the 75,000,000 acre-feet delivered by the Upper Basin at Lee Ferry survived further evaporation and channel losses and were all diverted, an additional amount would be required to enable the beneficial consumptive use of that quantity, for returns to the river are not part of such consumptive use. The ten year guarantee is gross; the annual apportionment is net. Inasmuch as the two provisions relate to two clearly severable

obligations and are in no wise inconsistent one with the other, their joint presence in the Compact gives rise to no ambiguity whatever.

No oral testimony could be received under established rules of evidence to resolve an ambiguity which does not exist.

In our opening brief we said that testimony contradicting the plain language of the Compact was inadmissible, whether the treaty be viewed as a written contract protected by the parol evidence rule or as a statute protected by the rules of statutory construction. This is true whether the proposed testimony relates to Article III(b), as the Bill says, or to Article III(a), as the Brief suggests. As to the matter of statutory construction, Arizona cites no cases. On the point relating to the parol evidence rule Arizona cites ten cases, all of them dealing with contracts in which the language was manifestly ambiguous or which referred to transactions which parol evidence was necessary to identify; as, for instance, the exception of certain cattle previously sold, from a contract of sale (*Lonergan v. Buford,* 148 U. S. 581); the fixing of the amount of oats for which a bid had been accepted (*Merriam v. United States,* 107 U. S. 437); the debts covered by a settlement (*Runkle v. Burnham,* 153 U. S. 216); whether a letter agreeing to a settlement was without prejudice (*West v. Smith,* 101 U. S. 263), and so on. No case has been cited which says that parol evidence can be introduced to contradict the terms of a written contract, and the contrary rule is expressed in some of the cases cited.

II.

EVEN IF THE COMPACT WERE AMBIGUOUS THE PROPOSED TESTIMONY WOULD BE INADMISSIBLE.

We have already presented full argument that even if an ambiguity did exist in the Compact, interpretation could not be aided by testimony concerning conversations had between negotiators who had no power to bind their principals. Any ambiguity must be aided if at all by material properly before the respective state legislatures and before the Congress by which the Compact was approved and made binding. This argument, heretofore presented, is as applicable to the "main stream water" theory set up in the Brief as it is to the "all III(b) water to Arizona" theory set up in the Bill. We therefore refrain from repetition.

III.

THE REAL TARGETS OF ARIZONA'S ATTACK ARE THE BOULDER CANYON PROJECT ACT AND THE CALIFORNIA LIMITATIONS ACT.

A study of Arizona's Brief brings out that the real nub of Arizona's complaint lies not in any language of the Compact which, according to her own allegations, clearly states what it was intended to state, but in the language of the Boulder Canyon Project Act and the California Limitations Act, enacted respectively six and seven years after signature of the Compact. These Acts in identical language limit California to 4,400,000 acre-feet of the

waters apportioned to the lower basin by paragraph (a) of Article III of the Colorado River Compact, plus not more than one-half of any excess or surplus waters unapportioned by said Compact. (Bill, pp. 30 and 31; also p. 55)

Article III(b) is not specifically mentioned in the two Acts referred to. Arizona desires to lay a foundation for the contention that no part of the 1,000,000 acre-feet referred to in Article III(b) is available for appropriation in California. We do not deem this an appropriate action or proceeding in which to determine the point thus suggested. The question before us now is whether oral testimony relating to conversations occurring in Santa Fe in 1922 could affect or be admitted in aid of the interpretation of the Boulder Canyon Project Act adopted in 1928 or the California Limitations Act adopted in 1929. It appears from the Bill that the claimed conversations were not known to any persons other than the witnesses named in the bill. (Bill, p. 68.)

That which Arizona seeks to interpret is not the Compact but the subsequent legislation. The rules governing statutory construction are well established. Arizona's proposal does not conform to them. In effect, this is an offer of conversations occurring between persons not members of any legislative body and not communicated in any way to the members of such legislative bodies, and known only to participants at Santa Fe (Bill, p. 68).

But it is suggested in Arizona's Brief (p. 17) that complainant

> "hopes to be able to show in the case hereafter to be brought by it, by competent, relevant and material evidence of the hearings and reports

> of the Congressional committees and statements made in Congress and the legislative history of the Act, that it was the intent of Congress to impose a limitation on California by the terms of the Boulder Canyon Project Act of 4,400,000 acre-feet of the water apportioned by Article III(a) of the Compact plus one-half of the surplus or unapportioned waters of the main stream of the Colorado River, thereby saving to Arizona its tributaries and the 1,000,000 acre-feet per annum therefrom permitted by the understanding, of which testimony is sought to be perpetuated and assuring to Arizona and those claiming under it the right to appropriate one-half of the surplus or unapportioned waters of the main stream present in the lower basin for use, in excess of the 7,500,000 acre-feet apportioned to the lower basin by Article III(a) of the Colorado River Compact."

The hope stated in the quoted paragraph presupposes that the statutes concerned are ambiguous and uncertain. We say that they are not. But if they were, the proposed testimony would be inadmissible. If the alleged transactions are, as Arizona says, part of the legislative history of an act, that legislative record speaks for itself and cannot be augmented or diminished by what was said and done at Santa Fe. Further, "hearings" do not constitute a committee report; "statements made in Congress" do not bind Congress, with narrow exceptions not relied on by Arizona; and even the report of a committee cannot contradict a statute. The cases on these elemental propositions were cited in our opening brief and none have been cited in answer.

CONCLUSION

Arizona's brief (page 22) inquires "Who can say that the testimony herein sought to be perpetuated will not be admissible?"

This appears to be an unwarranted shifting of the burdens of this action. Complainant has set up certain specific purposes which the testimony sought to be perpetuated is supposed to serve. That is, these witnesses "alone know the facts relating to the true construction, meaning and intent of said subdivision (b) of Article III of the said Colorado River Compact." Arizona says that these witnesses will show that an oral agreement was made at a specified time and place to one specific effect: "that the waters apportioned by Article III, (b), of said compact were for the sole and exclusive use and benefit of the state of Arizona", and that a "supplemental compact should so provide" (Bill, p. 14). If this is the testimony and this is the issue, the admissibility of the evidence can be determined now as effectively as it may be in subsequent litigation, after it shall have been recorded. If the complainant is not to be held to the issue stated in the bill, the alternative is the recordation of evidence not addressed to any particular subject but which, it is claimed, some day in some court or before some tribunal might possibly be pertinent to some unforeseeable and unframed issue. We cannot assume that this court will tolerate anything in the nature of a fishing expedition.

Arizona's brief argues that the Compact does not affect her tributaries below Lee Ferry because, according to the theory of the brief, only main-stream water at that point is apportioned by the Compact;

while at the same time her bill claims 1,000,000 acre-feet of III(b) water upon the ground that it was given her in lieu of and to compensate for the inclusion of her tributaries in the Compact apportionment.

If this Court permits testimony to be taken on the basis of Arizona's brief, the effect will be to confuse the use of all waters of the Colorado River system affected by the Compact for whatever length of time intervenes between the taking of the testimony and the final decision of the future suit in which Arizona proposes to use that evidence. All of the objections we raised in our first brief to the proposed modification of Article III(b) apply with increased emphasis to this new venture into Article III(a). The proposed testimony, if it supports Arizona's contention, will directly contradict the terms of Article II(a) of the Compact, which defines the Colorado River system (Bill, p. 16) as well as Article III(a), which declares that an apportionment of waters of the system is being made (Bill, p. 17). In both clauses, Arizona's proposed revision would have the effect of rewriting the Compact so as to accomplish without the consent of the six other states and the United States what her negotiator failed to accomplish in 1922: namely, the elimination of the Lower Basin tributaries from the division of waters. She proposes to show that the negotiators did just what her Bill says they refused to do; that is, restrict their agreement to waters of the river at Lee Ferry.

The Bill implies what the Brief fails to admit: That the six parties to the Compact would have re-

fused to accept it if Arizona's present construction were correct.

Arizona's motion for leave to file its bill should be denied.

Respectfully,

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No. (Original)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1933.

STATE OF ARIZONA, *Complainant*,

v.

STATE OF CALIFORNIA, ET AL., *Defendants*.

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF THE CITY AND COUNTY OF DENVER.

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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Cases cited:

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1933.

No. ORIGINAL

STATE OF ARIZONA, *Complainant,*

v.

STATE OF CALIFORNIA, ET AL., *Defendants.*

MOTION OF THE CITY AND COUNTY OF DENVER FOR LEAVE TO FILE BRIEF AMICUS CURIAE.

The City and County of Denver, a municipal corporation organized and existing under and by virtue of the Constitution and laws of the State of Colorado, by its Board of Water Commissioners, moves the Court for leave to file a brief amicus curiae in opposition to the motion of the complainant to file its Bill herein, and submits such brief herewith.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933.

No. (ORIGINAL)

STATE OF ARIZONA, *Complainant,*

v.

STATE OF CALIFORNIA, ET AL., *Defendants.*

BRIEF AMICUS CURIAE OF THE CITY AND COUNTY OF DENVER IN OPPOSITION TO THE MOTION OF THE COMPLAINANT TO FILE ITS BILL HEREIN.

JURISDICTION.

This is an original action by a State, asserting jurisdiction under the Constitution of the United States, Article III, section 2, clauses 1 and 2. No statute is applicable.

The motion of the complainant was submitted February 14, 1934, for leave to file its bill to perpetuate testimony.

QUESTIONS PRESENTED.

1. Has this Court jurisdiction to entertain an original bill to perpetuate testimony?

2. Would the proposed testimony, if taken, be admissible for any purpose suggested by the complainant?

3. Is the United States, which has not consented to be sued, an indispensable party?

CONSTITUTION AND STATUTES INVOLVED.

Constitution of the United States, Article III, section 2, clauses 1 and 2.

The Boulder Canyon Project Act, approved December 21, 1928, c. 42, 45 Stat. 1057-1067, which appears in full in the Bill, pp. 25-52.

The Colorado River Compact, authorized by the Act of August 19, 1921, and approved by the Boulder Canyon Project Act, *supra,* and which Compact appears in full in the Bill, pp. 14-24.

STATEMENT.

The Colorado River Compact was drafted in Santa Fe, New Mexico, in 1922, by certain negotiators representing the seven states in the Colorado River basin under the chairmanship of the Honorable Herbert Hoover, representing the United States.

Complainant has tendered for filing its Bill to perpetuate the testimony of such of these seven negotiators as are now living and also of certain other persons who attended the said Santa Fe conference.

To its Bill complainant has named as defendants the six states, which, with the complainant, comprised the seven states represented at the Santa Fe conference. Complainant has also named as defendant to its Bill Honorable Harold L. Ickes, Secretary of the Interior of the United States. Complainant has also made defendants certain municipal corporations of the State of California, as water users or potential water users of water from the Colorado River.

The purpose of the Bill, as expressed therein, is to perpetuate the testimony of certain persons for use

in suits to be later brought by the complainant concerning the meaning of the Colorado River Compact and the Boulder Canyon Project Act and certain related matters. (Bill, pp. 67, 68.)

While complainant makes a number of California municipalities defendants to its Bill, it does not make the City and County of Denver, a municipality of the State of Colorado, such a defendant, although Denver is just as much a potential water user from the Colorado River as are the California municipalties made parties defendant. The only way, therefore, that Denver can present its position in regard to the Bill is as amicus curiae, and this brief has been caused to be prepared by the Board of Water Commissioners of the City and County of Denver for that purpose.

SUMMARY OF ARGUMENT.

1. The question of jurisdiction of the Court may be open to doubt.

2. The testimony sought could never become admissible or competent for any of the purposes stated in the Bill.

3. The United States is an indispensable party, and has not consented to be sued.

ARGUMENT.

I.

The Jurisdiction.

The question of jurisdiction has been discussed fully and elaborately in the brief filed by California and its municipalities and Denver adopts such California statement as fully as though repeated herein.

II.

The Proposed Testimony Would Not Be Admissible or Competent.

This matter is discussed in the brief of defendant Harold L. Ickes and more fully in the brief of California and its municipalities and this present brief will only deal with certain phases for the purpose of bringing out more fully certain matters.

Whenever it becomes necessary to refer to facts not alleged in the Bill, every effort will be made to refer only to such facts as are matters of common knowledge and therefore to be judicially noted; but we trust we will be pardoned if we unintentionally overstep in this statement of facts.

The tendency for a number of decades last past has been for our population in the United States to center in the larger cities. This has resulted in the matter of urban water supply becoming vastly more important than in the earlier history of the United States. Moreover the general record of all large cities is that the amount of water used per capita is rapidly increasing. Consequently the problem of water supply for cities is ever becoming of greater consequence.

This matter of the necessity for increasing amounts of water for urban use was brought to the attention of this Court in Connecticut v. Massachusetts, 282 U. S. 660, where this Court sustained the right of the Massachusetts legislature to make radical changes in the basic law of waters of that state in order to permit of the providing of sufficient water for city use.

If water is so vital for the cities of Massachusetts,

it needs no stretch of the imagination to picture the necessity of cities in the arid region, like Los Angeles and other Southern California cities and Denver, to have an ample water supply. And it so happens that these cities, situated nearly two thousand miles apart, depend on the waters of the same stream—the Colorado River—for their possibility of future growth. Each has used up in its existing plant all the nearby sources of water, and each must go to the Colorado River for the increasing supply of water which each needs.

Both California municipalities and Denver have already spent millions of dollars in beginning the development of their water supply from the Colorado River and each is now spending large sums of money in the prosecution of such development.

These large expenditures, in the main, have been made since the adoption of the Colorado River Compact and in reliance thereon. Without the Compact there would be much uncertainty as to the waters of the Colorado River. Litigation over the waters of interstate streams, which is the method used in the past for settling the relative rights of the various interested states, has not been productive of finality in the settling of these rights. The first suit over the Arkansas, Kansas v. Colorado, 206 U. S. 46, was followed by another suit, Kansas v. Colorado, 275 U. S. 511. And, in like manner the first suit over the waters of the Laramie, Wyoming v. Colorado, 259 U. S. 419, is now followed by another, Wyoming v. Colorado, 282 U. S. 75.

In view of this difficulty of obtaining final settlement of the waters of interstate streams by litigation,

it is not surprising that efforts have been made in recent years to secure such settlements by treaty—that is, by compacts. It may be, of course, that compacts will not prove to be any more efficient than litigation has been in settling these water controversies; but at any rate the new method of settlement by compact should be given a fair trial, and these compacts should be upheld whenever fairly possible.

It is this desire to see the Colorado River compact upheld that has induced the preparation of this brief, on behalf of the City of Denver. The position of Denver is very simple. It is that Arizona, by tendering this Bill, is attempting to whittle down the Colorado River Compact. She is attempting to do it, by trying to preserve as evidence the conversations of persons who were present at Santa Fe when the compact was negotiated. These persons are not only the negotiators but certain additional persons named in the Bill, who were present in a private capacity to advise the negotiators.

Complainant seeks to justify her Bill by referring to the well known rule that in construing ambiguous contracts, the declarations of the parties may be considered. But the persons present at Santa Fe, whether they were negotiators or advisers, were not parties to the contract. The parties were the United States and the several states, and the United States and the several states became parties to the contract solely by legislative action ratifying the contract.

The Colorado River Compact, therefore, having only become binding by legislative action, must be construed like any other piece of legislation. There are certain matters, such as committee reports, etc.,

which may be looked to in construing ambiguous legislation, but these are contained in public records. It is both their public nature and their intimate relation to the legislation that makes the matters admissible in construing legislation.

In the case of the matters set out in the Bill, however, there are lacking both the public character of the evidence and its intimate relationship to the legislation. The lack of public records is evidenced by the very purpose of the Bill which is to create a private record. And it is apparent at a glance that words spoken by negotiators and their advisers in Santa Fe and not communicated to Congress or the several state legislatures cannot have influenced the forming of the legislation.

The meaning of legislation, on the strength of which municipalities have spent and are spending millions of dollars, should not depend on private statements made by negotiators and by the advisers of these negotiators; and that is precisely what is sought by the Bill. The mere perpetuation of the testimony is bound to have some effect in removing confidence in the efficacy of the Colorado River Compact; and such removal of confidence cannot but be harmful to the municipalities engaged in prosecuting these vast enterprises.

III.

Is the United States, Which Has Not Consented to be Sued, an Indispensable Party?

This matter has been fully and carefully discussed in both the brief of defendant Harold L. Ickes and

the brief of the California defendants, and nothing need be added to such discussion.

CONCLUSION.

It is respectfully submitted that the motion of complainant for leave to file the Bill should be denied.

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SUPREME COURT OF THE UNITED STATES.

— Original.—October Term, 1933.

State of Arizona, Complainant,
vs.
State of California, et al.

[May 21, 1934.]

Mr. Justice Brandeis delivered the opinion of the Court.

On October 13, 1930, Arizona sought, by an original bill, a declaration that the Colorado River Compact and the Boulder Canyon Project Act be decreed to be unconstitutional and void; that the Secretary of the Interior and California, Nevada, Utah, New Mexico, Colorado and Wyoming be permanently enjoined from carrying out said Compact or said Act; and that they be enjoined from performing contracts which had been executed by the Secretary on behalf of the United States for the use of stored water and developed power after the project shall have been completed, and from doing any other thing under color of the Act. The bill was "dismissed without prejudice to an application for relief in case the stored water is used in such a way as to interfere with the enjoyment by Arizona, or those claiming under it, of any rights already perfected or with the right of Arizona to make additional legal appropriation and to enjoy the same." *Arizona* v. *California*, 283 U. S. 423, 464.

On February 14, 1934, Arizona moved for leave to file in this Court its original bill of complaint to perpetuate testimony in an action or actions arising out of the Boulder Canyon Project Act which "at some time in the future" it will commence in this Court against California, and others therein named as defendants.[1] The bill sets forth:

(a) The Act of Congress, August 19, 1921, c. 72, 42 Stat. 171, which authorized Arizona, California, Colorado, Nevada, New

[1]Namely, Colorado, Nevada, New Mexico, Utah, Wyoming, Harold L. Ickes, Secretary of the Interior, Palo Verde Irrigation District, Imperial Irrigation District, Coachella Valley Water District, Metropolitan Water District of Southern California, City of Los Angeles, City of San Diego, and County of San Diego.

Mexico, Utah and Wyoming to enter into a compact regarding the waters of the Colorado River; and the appointment of a representative to act for the United States.

(b) The Colorado River Compact dated November 24, 1922, signed by representatives of the seven States—to "become binding and obligatory when it shall have been approved by the legislature of each of the signatory States and by the Congress of the United States."

(c) The Act of Congress, December 21, 1928, known as the Boulder Canyon Project Act, c. 42, 45 Stat. 1057, which approved the Colorado River Compact subject to certain limitations and conditions, the approval to become effective upon the ratification of the compact, as so modified, by the legislature of California and at least five of the other six States.

(d) The Act of California, c. 16, March 4, 1929, limiting its use of the waters of the Colorado River in conformity with the Boulder Canyon Project Act.

(e) The Proclamation of the President declaring the Boulder Canyon Project Act to be in effect, June 25, 1929, 46 Stat. 3000.

(f) The General Regulation of the Secretary of the Interior, concerning the storage of water in Boulder Dam Reservoir and the delivery thereof, dated April 23, 1930, as amended September 28, 1931.

The bill alleges, among other things:

That no right of Arizona has yet been interfered with; that attempts will be made hereafter to interfere with its rights; that it is not possible to bring the issues which will arise to an immediate judicial investigation or determination and it may be years before this can be done because "the cause or causes of action have not accrued and may not accrue for years to come;" that facts known only to certain named persons will be evidence material in the determination of such controversy or controversies; that these persons will be necessary witnesses in the prosecution of the action or actions which Arizona will be compelled to institute in order to protect its rights and those of persons claiming under it; and that all the persons with present knowledge of the present facts may not be available as witnesses when the cause or causes of action shall have accrued to the plaintiff. The prayer is for process to take the oral depositions and to perpetuate the testimony of these witnesses.

On February 20, 1934, a rule issued to those named as defendants to show cause why leave to file the bill should not be granted. All filed returns. Colorado, Nevada, New Mexico, Utah and Wyoming stated that they have no objection to the filing of the bill or to the taking of any competent testimony; and prayed that to each state should be granted the right of cross examination and the right to object to any such testimony on any ground either at the time of the taking or of its presentation to this Court. California and the public agencies of that state expressed a doubt as to the existence of jurisdiction in this Court. They opposed the granting of the motion on the ground that the testimony if taken would not be admissible in evidence; opposed also on the ground that the United States is an indispensable party; and insisted that the bill should not be received in the absence of consent by the United States to be sued. The Secretary of the Interior conceded that this Court has jurisdiction, but objected on the same grounds as California to granting the motion. Thereupon, a brief was filed by Arizona, reply briefs by respondents and a brief *amicus curiae* by the City and County of Denver, Colorado.

First. No bill to perpetuate testimony has heretofore been filed in this Court; but no reason appears why such a bill may not be entertained in aid of litigation pending in this Court, or to be begun here. Bills to perpetuate testimony had been known as an independent branch of equity jurisdiction before the adoption of the Constitution.[2] Congress provided for its exercise by the lower federal courts.[3] There the jurisdiction has been repeatedly invoked;[4] and it has been recognized by this Court.[5]

The sole purpose of such a suit is to perpetuate the testimony. To sustain a bill of this character, it must appear that the facts

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[2] 1 Pomeroy's Equity Jurisprudence, (4th ed.) § 211; West *v.* Lord Sackville, L. R. [1903] 2 Ch. Div. 378.

[3] Revised Statutes, § 866: " . . . any circuit [district] court upon application to it as a court of equity, may, according to the usages of chancery, direct depositions to be taken *in perpetuam rei memoriam*, if they relate to any matters that may be cognizable in any court of the United States. . . ."

[4] New York etc. Coffee Polishing Co. *v.* New York Polishing Co., 9 Fed. 578; 11 Fed. 813; Richter *v.* Jerome, 25 Fed. 679; Westinghouse Machinery Co. *v.* Electric Storage Battery Co., 170 Fed. 430; reversing 165 Fed. 992; The West Ira, 24 F. (2d) 858; Todd Engineering Co. etc. *v.* United States, 32 F. (2d) 734; Union Solvents Corp. *v.* Butacet Corp., 2 F. Supp. 375.

[5] Richter *v.* Union Trust Co., 115 U. S. 55; compare Green *v.* Compagnia Generale etc., 82 Fed. 490, 494-5.

which the plaintiff expects to prove by the testimony of the witnesses sought to be examined will be material in the determination of the matter in controversy; that the testimony will be competent evidence; that depositions of the witnesses cannot be taken and perpetuated in the ordinary methods prescribed by law, because the then condition of the suit (if one is pending) renders it impossible, or (if no suit is then pending) because the plaintiff is not in a position to start one in which the issue may be determined; and that taking of the testimony on bill in equity is made necessary by the danger that it may be lost by delay.

The allegations of the bill presented by Arizona are sufficient to show danger of losing the evidence by delay; and also to show Arizona's inability to perpetuate the testimony by the ordinary methods prescribed by law for the taking of depositions. The only question which requires consideration is whether the testimony which it is proposed to take would be material and competent evidence in the litigation contemplated.

Second. The action or actions which Arizona expects to bring may rest upon a claim that "the stored water is used in such a way as to interfere with the enjoyment by Arizona, or those claiming under it, of any rights already perfected or with the right of Arizona to make additional legal appropriations and to enjoy the same." Specifically, Arizona claims rights under § 4 (a) of the Boulder Canyon Project Act; these rights, it is said, are governed in turn by the terms of the Colorado River Compact. Briefly, the Compact apportions the waters of the Colorado River between a group of States, termed the upper basin, north of Lee Ferry, and a group south thereof, the lower basin, among which are Arizona and California. The interference apprehended will, it is alleged, arise out of a refusal of the respondents to accept as correct that construction of Article III (b) of the Compact which Arizona contends is the proper one. It claims that this paragraph, which declares:

"In addition to the apportionment in Paragraph (a), the lower basin is hereby given the right to increase its beneficial consumptive use of such waters by 1,000,000 acre-feet annum."

means:

"that the waters apportioned by Article III (b) of said compact are for the sole and exclusive use and benefit of the State of Arizona."

The bill charges that the Secretary of the Interior and the other defendants refuse to accept such construction; and that, by certain contracts made between the Secretary and the California defendants, they are asserting a right to appropriate the said 1,000,000 acre-feet of water to California uses. The bill states that the decision in some future action construing Paragraph (b) will materially affect rights of Arizona arising under the Boulder Canyon Project Act, in particular § 4 (a) thereof.[6]

Arizona seeks, as stated in the bill, to perpetuate, and proposes to introduce in support of its construction of Paragraph (b) of Article III, of the Compact, in the actions to be brought in the future, testimony to the following effect by those who in 1922 were connected with the negotiation of the Compact:

"The representatives of all the States and the United States except the Arizona delegation were in agreement as to the definition of the Colorado River System, including the Gila River and its tributaries, and as to the division proposed, which substantially apportioned the waters of the Colorado River at Lee Ferry, the point selected as dividing the Upper Basin from the Lower Basin. The Arizona delegation refused and declined to accept the proposed compact because of the inclusion of the Gila River and its tributaries without any compensating provision to the State of Arizona in lieu of the waters thereof, which had already been appropriated and in which no other State could have any interest on account of the further fact that the waters of the Gila River and its tributaries enter the Colorado River at Yuma, at a point so far down stream and of such low elevation that it was and is impossible to put the waters thereof to beneficial use in the United States after they reach the main stream of the Colorado River. Hence, the Arizona delegation pointed out that the conference was discussing something which had already been disposed of and in any event could not concern any State, other than Arizona. Several days elapsed in a discussion between the said representatives of this problem before a solution was found. The problem was finally thought solved by adding subdivision (b) of Article III to the compact as finally approved by said representatives which reads as follows:

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[6]It is claimed that a future decision as to the meaning of Article III (b) will affect rights also under (a) the Colorado River Compact, (b) the conditions required by the Boulder Canyon Project Act to be attached to patents, grants, contracts, concessions, leases, permits, rights of way and other privileges from the United States, (c) the relative and respective rights of each of the parties (to the suit to perpetuate testimony) in the waters of the Colorado and its tributaries, and the use thereof and the burdens and restrictions upon such use.

"(b) In addition to the apportionment in paragraph (a), the Lower Basin is hereby given the right to increase its beneficial consumptive use of such waters by one million acre-feet per annum."

"It was agreed between all the representatives of the various States and the representative of the United States, negotiating said compact, that said one million acre-feet apportioned by subdivision (b) of Article III of said compact was intended for and should go to the State of Arizona to compensate for the waters of the Gila River and its tributaries being included within the definition of the Colorado River System and the allocations of said compact, and that said one million acre-feet was to be used exclusively by and for the State of Arizona, that being the approximate amount of water then in use within the State of Arizona from the Gila River and its tributaries, and it was agreed that in view of the fact that no appropriation or allocation of water had otherwise been made by said compact directly to any State, the one million acre-feet for the State of Arizona should be included in said compact by an allocation for the Lower Basin. And it was further agreed that a supplemental compact between the States, California, Nevada and Arizona should be adopted and that such supplemental compact should so provide.

"The Arizona delegation stated that if it were agreed by all the representatives of the several States and of the United States that said million acre-feet should be for the exclusive benefit of the State of Arizona to provide compensation to Arizona on account of the inclusion of the waters of the Gila River and its tributaries in said compact, they would accept said compact, otherwise they would refuse to accept said compact. It was thereupon agreed by all representatives of all the States and of the United States, participating in said negotiations and conferences, that the waters apportioned by Article III, (b), of said compact were for the sole and exclusive use and benefit of the State of Arizona, and it was further agreed that a supplemental compact between the States of California, Nevada and Arizona should be adopted and that such supplemental compact should so provide. Thereupon said compact was signed by the representatives of the several States and of the United States."

Third. In this suit Arizona asserts rights under the Boulder Canyon Project Act of 1928, not under the Colorado River Compact, which she has refused to ratify. That Act approved the Colorado River Compact subject to certain limitations and conditions, the approval to become effective upon the ratification of the Compact, as so modified, by the legislatures of California and at least five of the six other states. It was so ratified. Arizona claims that

§ 4 (a) of that Act imposing limitations on the use of water by California was intended for her benefit; that § 4 (a) embodies by reference Article III (b), among others, of the Compact for the purpose of defining the limitation and that the proper interpretation of Article III (b) will be, therefore, essential to a determination of Arizona's rights under the statute; that, read in the light of other sections of the Compact, Article III (b) is ambiguous; and that the testimony sought to be perpetuated will be material and admissible in removing the ambiguity. The elaborate argument in support of these contentions appears to be, in substance, as follows:

1. Colorado River Compact, apportions the water of the Colorado River System between the upper and the lower basin. By Article II it defines the terms used:

"(a) The term 'Colorado River system' means that portion of the Colorado River and its tributaries within the United States of America."

"(b) The term 'Colorado River Basin' means all of the drainage area of the Colorado River system and all other territory within the United States of America to which the waters of the Colorado River system shall be beneficially applied."

"(g) The term 'Lower Basin' means those parts of the States of Arizona, California, Nevada, New Mexico and Utah within and from which waters naturally drain into the Colorado River system below Lee Ferry and also all parts of said States located without the drainage area of the Colorado River system which are now or shall hereafter be beneficially served by waters diverted from the system below Lee Ferry."

By Article III, the apportionment is made:

"(a) There is hereby apportioned from the Colorado River system in perpetuity to the upper basin and to the lower basin, respectively, the exclusive beneficial consumptive use of 7,500,000 acre-feet of water per annum, which shall include all water necessary for the supply of any rights which may now exist."

"(b) In addition to the apportionment in Paragraph (a), the lower basin is hereby given the right to increase its beneficial consumptive use of such waters by 1,000,000 acre-feet per annum."

"(d) The States of the upper division [Colorado, New Mexico, Utah and Wyoming] will not cause the flow of the river at Lee Ferry to be depleted below an aggregate of 75,000,000 acre-feet for any period of 10 consecutive years reckoned in continuing progressive series beginning with the first day of October next succeeding the ratification of this compact."

Article III does not in terms apportion as between the upper and the lower basin the surplus waters in excess of the amounts spe-

cifically allocated. But it recognizes in Paragraph (c) that there may be "surplus" waters in the River, applicable to the lower basin.[7]

2. The Colorado River Compact does not purport to apportion between the States of the lower basin the share of each in the waters of the Colorado River System; but Boulder Canyon Project Act makes some provision for such apportionment. By § 4 (a) it provides that:

"California, by act of its legislature, shall agree irrevocably and unconditionally with the United States and for the benefit of the States of Arizona, Colorado, Nevada, New Mexico, Utah and Wyoming, as an express covenant and in consideration of the passage of this Act, that the aggregate annual consumptive use (diversions less returns to the river) of water of and from the Colorado River for use in the State of California, including all uses under contracts made under the provisions of this Act and all water necessary for the supply of any rights which may now exist, shall not exceed four million four hundred thousand acre-feet of the waters apportioned to the lower basin States by paragraph (a) of Article III of the Colorado River compact, plus not more than one-half of any excess or surplus waters unapportioned by said compact, such uses always to be subject to the terms of said compact."

And that section authorizes Arizona, California and Nevada to enter into an agreement which, among other things, shall provide:

"(1) That of the 7,500,000 acre-feet annually apportioned to the lower basin by paragraph (a) of Article III of the Colorado River compact, there shall be apportioned to the State of Nevada 300,000 acre-feet and to the State of Arizona 2,800,000 acre-feet for exclusive beneficial consumptive use in perpetuity, and (2) that the State of Arizona may annually use one-half of the excess or surplus water unapportioned by the Colorado River compact, and (3) that the State of Arizona shall have the exclusive bene-

[7]Paragraph (c) provides: "If, as a matter of international comity, the United States of America, shall hereafter recognize in the United States of Mexico any right to the use of any waters of the Colorado River system, such waters shall be supplied first from the waters which are surplus over and above the aggregate of the quantities specified in paragraphs (a) and (b); and if such surplus shall prove insufficient for this purpose, then, the burden of such deficiency shall be equally borne by the upper basin and the lower basin, and whenever necessary the States of the upper division shall deliver at Lee Ferry water to supply one-half of the deficiency so recognized in addition to that provided in paragraph (d).

ficial use of the Gila River and its tributaries within the boundaries of said State . . . (7) said agreement to take effect upon the ratification of the Colorado River compact by Arizona, California and Nevada."

3. Arizona refused to ratify the Colorado River Compact, and the authority conferred upon Arizona, Nevada and California by the Boulder Canyon Project Act to enter into an agreement for apportioning the waters has not been acted on. But California bound itself, by the Act of its legislature, March 16, 1929, to the limitation of 4,400,000 acre-feet, plus one-half of the surplus; Arizona claims that the limitation on California's use must have been enacted for the benefit solely of Arizona, since geographically she alone could use waters in the lower basin which California may not use; and that, because it is embodied in a statute, the limitation imposed by Congress on California's use confers rights upon Arizona, although she failed to sign either the principal or the subsidiary compact.

4. In support of the contention that Article III (b) of the Compact has a bearing on the interpretation of the limitation of § 4 (a) of the Act, Arizona points to the fact that while the Boulder Canyon Project Act makes no mention of the 1,000,000 acre-feet assigned to the lower basin by Article III (b) of the Compact, § 4 (a) of the Act limits California, in terms, to 4,400,000 acre-feet of the waters apportioned to the lower basin under Article III (a) of the Compact plus one-half of the "surplus waters unapportioned by said compact;" that § 4 (a) declares that such uses by California are "always to be subject to the terms of said compact;" that California claims that, in addition to the waters already mentioned, she is entitled, as one of the parties to the Compact, to draw upon the Article III (b) waters; and that, acting upon this assumption, the Secretary of the Interior has already contracted with California users for delivery of 5,362,000 acre-feet of water per annum from the main stream of the Colorado River, though this water is not yet being delivered; whereas Arizona contends that by a proper interpretation of Article III (b) California is excluded from all the waters thereunder in favor of Arizona.

5. In support of the contention that Article III (b) is ambiguous, Arizona points out that, whereas the Compact awards to the lower basin, in the aggregate, 8,500,000 acre-feet of water,[8] Article

[8]That is the 7,500,000 of the Article III (a) waters and the 1,000,000 of the Article III (b) waters.

III (d) of the Compact shows that only 7,500,000 of this is to come from the main stream of the Colorado River, since that section provides:

"The States of the upper division will not cause the flow of the River at Lee Ferry to be depleted below an aggregate of 75,000,000 acre-feet for any period of 10 consecutive years reckoned in continuing progressive series beginning with the first day of October next succeeding the ratification of this compact."

It argues that the 75,000,000 was doubtless arrived at through multiplying by ten the 7,500,000 acre-feet per annum apportioned to the lower basin under Article III (a); that though the lower basin is entitled to 8,500,000 acre-feet, it can only call on the upper basin to release 7,500,000 acre-feet from the main stream; that the only other waters below Lee Ferry which are available to the lower basin come from tributaries entirely in Arizona; that these waters enter the Colorado River at a point so far south that they could not be used in the United States after they enter the Colorado; and they have in fact been appropriated for use in Arizona; that, therefore, what has in terms been awarded to the lower basin is in practical effect available only to that part of the lower basin constituted by Arizona.

Fourth. It is clear that the meaning of the Compact, considered merely as a contract, can never be material in the contemplated litigation, since Arizona refused to ratify the Compact. Arizona rests her rights wholly upon the Acts of Congress and of California. Arizona claims that California's construction of § 4 (a) of the statute would allow her water which under the Compact has been assigned to Arizona, and that a conflict is thus raised between the statute and the Compact which the suggested testimony is competent to resolve. But the resolution of this alleged conflict can never be material to any case based on the Compact considered as contract, since Arizona neither has nor claims any contractual right.

Fifth. Nor does Arizona show that Article III (b) of the Compact is relevant to an interpretation of § 4 (a) of the Boulder Canyon Project Act upon which she bases her claim of right. It may be true that the Boulder Canyon Project Act leaves in doubt the apportionment among the states of the lower basin of the waters to which the lower basin is entitled under Article III (b). But the Act does not purport to apportion among the states of the lower basin the waters to which the lower basin is entitled under the

Compact. The Act merely places limits on California's use of waters under Article III (a) and of surplus waters; and it is "such" uses which are "subject to the terms of said compact."

There can be no claim that Article III (b) is relevant in defining surplus waters under § 4 (a) of the Act; for both Arizona and California apparently consider the waters under Article III (b) as apportioned.[9] It is true that Arizona alleges (not in the bill however but in her brief) that she "hopes to be able to show in the case hereafter to be brought" by evidence of Congressional Committee hearings and other legislative history that the failure in the statute to apportion the 1,000,000 acre-feet of waters was due to an understanding by Congress that Article III (b) of the Compact had already assigned these waters to Arizona and that the limitation on California was passed in the light of this understanding. This hope if fulfilled would not make Article III (b) relevant. The allegation is, not that Congress incorporated Article III (b) into the Act; it is that Congress understood that Article III (b) had allotted all the waters therein to Arizona.

Sixth. The considerations to which Arizona calls attention do not show that there is any ambiguity in Article III (b) of the Compact. Doubtless, the anticipated physical sources of the waters which combine to make the total of 8,500,000 acre-feet are as Arizona contends, but neither Article III (a) nor (b) deal with the waters on the basis of their source. Paragraph (a) apportions waters "from the Colorado River system" i. e., the Colorado and its tributaries and (b) permits an additional use "of such waters." The Compact makes an apportionment only between the upper and lower basin; the apportionment among the states in each basin being left to later agreement. Arizona is one of the states of the lower basin and any waters useful to her are by that fact useful to the lower basin. But the fact that they are solely useful to Arizona, or the fact that they have been appropriated by her, does not contradict the intent clearly expressed in Paragraph (b) (nor the rational character thereof) to apportion the 1,000,000 acre-feet to the states of the lower basin and not specifically to Arizona alone. It may be that, in apportioning among the states the 8,500,000 acre-feet allotted to the lower basin, Arizona's share

[9]The Secretary of the Interior in his brief seems to be of the opinion that waters under Article III (b) might be surplus waters under § 4 (a) of the Act.

of waters from the main stream will be affected by the fact that certain of the waters assigned to the lower basin can be used only by her; but that is a matter entirely outside the scope of the Compact.

The provision of Article III (b), like that of Article III (a) is entirely referable to the main intent of the Compact which was to apportion the waters as between the upper and lower basins. The effect of Article III (b) (at least in the event that the lower basin puts the 8,500,000 acre-feet of water to beneficial uses) is to preclude any claim by the upper basin that any part of the 7,500,000 acre-feet released at Lee Ferry to the lower basin may be considered as "surplus" because of Arizona waters which are available to the lower basin alone. Congress apparently expected that a complete apportionment of the waters among the States of the lower basin would be made by the sub-compact which it authorized Arizona, California and Nevada to make. If Arizona's rights are in doubt it is, in large part, because she has not entered into the Colorado River Compact or into the suggested sub-compact.

Seventh. Even if the construction to be given Paragraph (b) of the Compact were relevant to the interpretation of any provision in the Boulder Canyon Project Act and such provision were ambiguous, the evidence sought to be perpetuated is not of a character which would be competent to prove that Congress intended by § 4(a) of the 1928 Act to exclude California entirely from the waters allotted by Article III (b) to the states of the lower basin and to reserve all of those waters to Arizona. The evidence sought to be perpetuated is not documentary. It is testimony as to what divers persons said six years earlier while negotiating a compact with a view to preparing the proposal for submission to the legislatures of the seven States and to Congress for approval—a proposal which Arizona has not ratified and which the six other States and Congress did ratify, as later modified, by statutes enacted in 1928 and 1929. The Boulder Canyon Project Act rests, not upon what was thought or said in 1922 by negotiators of the Compact, but upon its ratification by the six States.

It has often been said that when the meaning of a treaty is not clear, recourse may be had to the negotiations, preparatory works, and diplomatic correspondence of the contracting parties to establish its meaning. *Nielsen* v. *Johnson,* 279 U. S. 47, 52; compare

United States v. *Texas*, 162 U. S. 1; *Terrace* v. *Thompson*, 263 U. S. 197, 223; *Cook* v. *United States*, 288 U. S. 102. See Yü, The Interpretation of Treaties, pp. 138, 192; Chang, The Interpretation of Treaties, p. 59 *et seq.* But that rule has no application to oral statements made by those engaged in negotiating the treaty which were not embodied in any writing and were not communicated to the government of the negotiator or to its ratifying body. There is no allegation that the alleged agreement between the negotiators made in 1922 was called to the attention of Congress in 1928 when enacting the Act; nor that it was called to the attention of the legislatures of the several States.

As Arizona has failed to show that the testimony which she seeks to have perpetuated could conceivably be material or competent evidence bearing upon the construction to be given Article III, Paragraph (b), in any action which may hereafter be brought, the motion for leave to file the bill should be denied. We have no occasion to determine whether leave to file the bill should be denied also because the United States was not made a party and has not consented to be sued.

Leave to file bill denied.

A true copy.

Test:

Clerk, Supreme Court, U. S.

FILE COPY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. Original.

THE STATE OF OHIO,

Complainant,

vs.

GUY T. HELVERING, as an Individual and as Commissioner of Internal Revenue, and THOMAS J. CONNOR, CARL E. MOORE, HARRY F. BUSEY, and CHARLES H. GRAVES, as Individuals and as United States Collectors of Internal Revenue in the State of Ohio.

MOTION FOR LEAVE TO FILE BILL OF COMPLAINT

and

BILL OF COMPLAINT.

The State of Ohio,
By John W. Bricker,
Attorney General,
William S. Evatt,
Chief Counsel,
Isadore Topper,
Assistant Attorney General,
Counsel for Complainant.

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1933

No. Original.

THE STATE OF OHIO,

Complainant,

vs.

GUY T. HELVERING, AS AN INDIVIDUAL AND AS COMMISSIONER OF INTERNAL REVENUE, AND THOMAS J. CONNOR, CARL E. MOORE, HARRY F. BUSEY, AND CHARLES H. GRAVES, AS INDIVIDUALS AND AS UNITED STATES COLLECTORS OF INTERNAL REVENUE IN THE STATE OF OHIO,

Defendants.

MOTION FOR LEAVE TO FILE BILL OF COMPLAINT.

Now comes the complainant, the State of Ohio, by its Attorney General John W. Bricker, and presents herewith its bill of complaint in the above entitled cause and respectfully moves this Court for leave to file the same in this Court under its original jurisdiction.

THE STATE OF OHIO,
By JOHN W. BRICKER,
Attorney General,
WILLIAM S. EVATT,
Chief Counsel,
ISADORE TOPPER,
Assistant Attorney General,
Counsel for Complainant.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933.

No. Original.

THE STATE OF OHIO,

Complainant,

vs.

GUY T. HELVERING, AS AN INDIVIDUAL AND AS COMMISSIONER OF INTERNAL REVENUE, AND THOMAS J. CONNOR, CARL E. MOORE, HARRY F. BUSEY, AND CHARLES H. GRAVES, AS INDIVIDUALS AND AS UNITED STATES COLLECTORS OF INTERNAL REVENUE IN THE STATE OF OHIO,

Defendants.

NOTICE OF HEARING.

Please take notice that on the 2nd day of April, 1934, or as soon thereafter as counsel can be heard, the motion of complainant for leave to file its bill of complaint in the above entitled cause will be submitted to the Supreme Court of the United States.

THE STATE OF OHIO,
By JOHN W. BRICKER,
Attorney General,
WILLIAM S. EVATT,
Chief Counsel,
ISADORE TOPPER,
Assistant Attorney General,
Attorneys for Complainant.

Proof of Service.

We hereby acknowledge receipt of copy of motion for leave to file bill of complaint, bill of complaint, notice of hearing and brief, this — day of ——, 1934.

Counsel for Defendants.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1932

No. Original.

THE STATE OF OHIO,

Complainant,

vs.

GUY T. HELVERING, AS AN INDIVIDUAL AND AS COMMISSIONER OF INTERNAL REVENUE, AND THOMAS J. CONNOR, CARL E. MOORE, HARRY F. BUSEY, AND CHARLES H. GRAVES, AS INDIVIDUALS AND AS UNITED STATES COLLECTORS OF INTERNAL REVENUE IN THE STATE OF OHIO,

Defendants.

BRIEF ON MOTION FOR LEAVE TO FILE BILL OF COMPLAINT.

As cause for this motion, it is respectfully shown:

1. That this cause involves a controversy between the State of Ohio and a citizen of another state.

2. That the State of Ohio, as complainant, is the real party in interest.

3. That it is not a suit to enforce a penalty under the state law and the nature of the controversy does not call for a judgment on a political or governmental question.

4. That no service of process can be had within the State of Ohio upon defendant Guy T. Helvering.

5. That this cause is of a justiciable character, of a civil nature, is within the judicial power of the United States, is instituted to redress a wrong and save the State of Ohio from irreparable injury as a sovereign state, and to save its duly constituted state officers from irreparable injury resulting from certain threatened acts on the part of defendants which are in conflict with the rights of the State of Ohio under the Constitution of the United States.

6. That this is an action arising from extraordinary and exceptional circumstances in which the State of Ohio and its officers and employes would be without adequate relief except by invoking the original jurisdiction of this Court in equity as set forth in complainant's bill of complaint.

7. Equity jurisdiction rests upon the claim that the excise taxes imposed by the order of the Commission of Internal Revenue of the United States place a cloud upon the title to over four million dollars worth of merchandise owned by the State of Ohio, and that the penalties and remedies provided by the Statutes of the United States for the enforcement of the payment of the excise taxes complained of are such that the complainant will be irreparably injured in its property rights and in the exercise of its governmental and sovereign powers as a state, and that a multiplicity of suits is imminent unless equity intervenes, and that more than one hundred eighty-seven of its officers and employes will be subject to severe penalties in exercising and carrying out the sovereign powers of the state unless equity intervenes. (*Hill* vs. *Wallace*, 259 U. S. 44.)

WHEREFORE, complainant prays that this Honorable Court may exercise its original jurisdiction in this controversy as provided in Article III, Section 2, Clause 2 of the Constitution of the United States.

THE STATE OF OHIO,
By JOHN W. BRICKER,
Attorney General,
WILLIAM S. EVATT,
Chief Counsel,
ISAAC R TOPPER,
Assistant Attorney General,
Attorneys for Complainant.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. Original.

THE STATE OF OHIO,

Complainant,

vs.

GUY T. HELVERING, AS AN INDIVIDUAL AND AS COMMISSIONER OF INTERNAL REVENUE, AND THOMAS J. CONNOR, CARL E. MOORE, HARRY F. BUSEY, AND CHARLES H. GRAVES, AS INDIVIDUALS AND AS UNITED STATES COLLECTORS OF INTERNAL REVENUE IN THE STATE OF OHIO,

Defendants.

BILL OF COMPLAINT.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

The bill of complaint of the State of Ohio, one of the states of the United States of America, respectfully shows this Honorable Court that:

1. The State of Ohio is one of the states of the United States of America and this action is brought on its behalf pursuant to the written request made on the Attorney General of Ohio by the Department of Liquor Control of the State of Ohio, a duly constituted department of the state government, and John W. Bricker is the duly elected, qualified and acting Attorney General of the State of Ohio.

2. Complainant further shows that Guy T. Helvering is a citizen of the State of Kansas and is the duly appointed, qualified and acting Commissioner of Internal Revenue of the Department of the Treasury, Government of the United States, at Washington, District of Columbia, and that defendants, Thomas J. Connor, Carl E. Moore, Harry F. Busey and Charles H. Graves are residents of Ohio and are the duly appointed, qualified and acting Collectors of Internal Revenue in the four Internal Revenue Districts of the State of Ohio, which include the eighty-eight counties comprising the State of Ohio.

3. This action is brought in the Supreme Court of the United States in the exercise of the original jurisdiction of said Court on the ground that it is an action in equity relating to a controversy between a state and a citizen of another of the United States.

4. Complainant further says that on December 22, 1933, the 90th General Assembly of the State of Ohio, in special session, passed an act in the exercise of its police power for the protection of the public welfare, health, peace and morals and to prohibit a return of the saloon and the return of the private wholesaler and retailer of spirituous liquors, known as House Bill No. 1. Said act carries out such public policy, by providing a system of control for the manufacture, sale, and importation of and traffic in beer and intoxicating liquors in said state, including a state monopoly of the distribution and sale of spirituous liquor, to create the Department of Liquor Control consisting of a Board of Liquor Control and a Director of Liquor Control, and defining their respective powers and duties, and for the use of the general revenue fund of the state; such act was approved by the Governor of Ohio December 23, 1933 and filed in the office of the Secretary of State at Columbus, Ohio on the 23rd day of December, 1933 (see Appendix "A").

5. Complainant further says that in accordance with the provisions of said House Bill No. 1 of the 90th General Assembly, special session, complainant, through its Department of Liquor Control, has purchased intoxicating liquor at a cost in excess of four and a half million dollars for sale to permit holders and to the public through its state stores, each of which will be under the control of a state supervisor as a classified state civil service employe or officer of the government of Ohio in charge of a retail intoxicating liquor establishment, and each of which will be entirely and exclusively state owned, managed and controlled, and is about to open in the various counties of the state one hundred eighty-seven (187) such state liquor stores.

6. Complainant further says that on or about March 19, 1934, without authority of law and in violation of the constitutional rights of complainant as a sovereign state in the conduct of its governmental activities, defendant Harry F. Busey, Collector of Internal Revenue in and for the 11th District of Ohio, notified in writing the Department of Liquor Control of the State of Ohio that by direction of the Commissioner of Internal Revenue, the State of Ohio is subject to the Federal liquor dealers' special tax at each location where liquor is sold or offered for sale at retail by the Department of Liquor Control of the State of Ohio and that the State of Ohio was required to pay an additional tax as a wholesaler of intoxicating liquor.

7. Complainant further says that defendants have threatened to and unless enjoined by this Court will levy and collect the Federal excise taxes on complainant's governmental agencies and operations in the conduct of its Department of Liquor Control, and also will enforce against it, its officers, agents and employes certain penalites for non-payment of said taxes, purporting to act under Sec. 3244, Revised Statutes of the United States (26 U. S. C. A.,

Sec. 205), Sec. 3233, Revised Statutes (26 U. S. C. A., Sec. 182), The Act of October 1, 1890, Chapter 1244, Sec. 53 (26 U. S. C. A., Sec. 186), Sec. 3235, Revised Statutes (26 U. S. C. A., Sec. 184), Sec. 3281, Revised Statutes (26 U. S. C. A., Sec. 193), thus interfering with the sovereign independence of the State of Ohio.

8. Complainant further says that it is not subject to or liable to pay either the wholesale liquor dealers' license tax, or the retail liquor dealers' license tax, nor is complainant liable to register with or make returns to the defendants or any of them concerning any such taxes.

9. Complainant further says that the Acts of Congress which impose the several taxes hereinabove referred to, do not by their terms include complainant or its officers or employes within their scope and were not intended to do so.

10. In attempting to collect any of said taxes from or to enforce any of the acts or regulations concerning such taxes against the complainant or any of its officers, agents or employes, the defendants, and any persons acting under them would be acting illegally and unconstitutionally, and outside the scope of their official authority. Any such action would be the illegal and unconstitutional action of the defendants individually and would be without the authority of the United States, and would not be an action of the United States.

11. Complainant further says that the circumstances surrounding the threatened unlawful and unauthorized acts of defendants as aforesaid are extraordinary and exceptional in the following respects:

(a) Any attempt of a Federal officer to tax a sovereign state is in itself a case of extraordinary and exceptional circumstances.

(b) The threatened attempt to apply to the State of Ohio the pertinent Federal statutes as aforesaid, with respect to the taxation of wholesale and retail liquor dealers, without the payment of the sums so unlawfully demanded by defendants as taxes, would result in the forfeiture to the United States of intoxicating liquor, the absolute property of the State of Ohio, of a value of approximately four and a half million dollars; and said threat of defendants so to do throws a cloud upon the title of the sovereign state to its liquor.

(c) The aforesaid threatened acts of defendants, without the payment of the sums so unlawfully demanded by defendants as taxes, would subject at least one hundred eighty-seven (187) state supervisors of state liquor stores who are officers, agents or employes of the State Government to arrest and fine and imprisonment for having performed their official duties.

(d) To pay the tax so unlawfully demanded by defendants would be a burden and an interference with the sovereign independence of complainant in its governmental capacity and necessitate a multiplicity of suits to recover back the amounts so paid.

(e) Since the adoption by the states of the 21st Amendment to the Constitution of the United States, a number of other states, like complainant, have, in view of past experience in dealing with the liquor traffic, found it necessary in the exercise of their police powers to take complete and exclusive control of this traffic as a governmental and sovereign function, with the result that in view of present economic conditions and the resultant strained financial conditions of complainant and other states, the remedy provided by law for payment of federal taxes, followed by a multiplicity of actions not only by Ohio, but by other states,

to recover the amount of taxes so paid, is wholly inadequate.

WHEREFORE, the complainant respectfully prays the Court, pending the final hearing of this case, to issue a temporary restraining order against the defendants and each of them and any and all of their deputies, agents, assistants and employes as hereinafter prayed for.

The complainant further prays the court upon final hearing:

That a permanent injunction be issued against the defendants and each of them, and any and all of their deputies, agents, assistants and employes, restraining and forbidding the defendants and each of them, and any and all of their deputies, agents, assistants and employes, to require or take any proceedings or steps to require the complainant, its officers, agents and employes to pay any federal retail or wholesale liquor dealer's tax, or to require the making or the filing of any returns for the purposes of such taxes, either in the name of the complainant, the Department of Liquor Control of the State of Ohio, or any officer, agent or employe of the complainant;

That the defendants and each of them, and any and all of their deputies, agents, assistants and employes be forbidden to forfeit, seize, levy or distrain upon, or to take any proceedings or steps to forfeit, levy, seize or distrain upon, any liquors or other property of the complainant because of any failure or refusal of the complainant, the Department of Liquor Control, and/or the officers, agents and employes of the complainant to make any such returns, or to pay any such taxes or to otherwise comply with any act or regulation concerning such taxes;

That the defendants and each of them, and any and all of their deputies, agents, assistants and employes be for-

bidden to file or to institute or cause to be filed or instituted any complaint, civil or criminal, against the complainant, the Department of Liquor Control, or the officers, agents and employes of the complainant for any failure or refusal to pay such taxes or to make such returns or to otherwise comply with any act or regulation concerning such taxes or returns;

That the defendants and each of them and any and all of their deputies, agents, assistants and employes, be forbidden from interfering by legal proceedings or otherwise with the operation or management of the liquor stores operated by the complainant through its officers, agents and employes throughout Ohio or with the complainant, its officers, agents and employes, the Department of Liquor Control, in carrying out the governmental purposes authorized by the legislature of the State of Ohio in respect to the sale and distribution of spirituous liquor in Ohio, because of the failure or refusal of the complainant or its officers, agents and employes to pay such taxes or to make such reports or to otherwise comply with any act or regulation concerning such taxes.

The complainant further prays that such other and further relief be granted as equity and justice require and which to the Court shall be seen proper.

STATE OF OHIO,
By JOHN W. BRICKER,
Attorney General.
WILLIAM S. EVATT,
Chief Counsel.
ISADORE TOPPER,
Assistant Attorney General,
Attorneys for Complainant.

Verification.

UNITED STATES OF AMERICA,
State of Ohio,
County of Franklin, ss:

JOHN A. HUGHES, being first duly sworn, according to law, deposes and says that he is the acting Director of the Department of Liquor Control of the State of Ohio; that he has read the foregoing bill of complaint; that the facts contained in said bill of complaint, which are within his own knowledge, are true and correct and that the facts averred upon information received from others are based upon information received from reliable sources and which facts he believes are true.

JOHN A. HUGHES.

Sworn to before me and subscribed in my presence this 27th day of March, 1934.

[Notarial Seal, Franklin County, Ohio.]

ROBERT B. BARCUS,
Notary Public, Franklin County, Ohio.

Verification.

UNITED STATES OF AMERICA,
State of Ohio,
County of Franklin, ss:

JOHN W. BRICKER, being duly sworn on oath says that he is the duly elected, qualified and acting Attorney General of the State of Ohio and that as such Attorney General of

the State of Ohio, he is duly authorized to pray leave to file the said bill of complaint.

JOHN W. BRICKER,
Attorney General of the State of Ohio.

Subscribed and sworn to before me by John W. Bricker this — day of ——, 1934.

—— ——,
Notary Public in and for
Franklin County, Ohio.

My commission expires the — day of —— 193–.

APPENDIX A.

(House Bill No. 1.)

AN ACT

To provide a system of control of the manufacture and importation of and traffic in beer and intoxicating liquors in this state, including a state monopoly of the distribution and sale of spirituous liquor; for that purpose to create the department of liquor control, to consist of the board of liquor control and the director of liquor control and define their respective powers and duties; to levy a tax on the sale of wine and spirituous liquor and a gross excess profits tax on the manufacture and sale of spirituous liquor, for the use of the general revenue fund of the state; to amend sections 6203, 6212-43, 6212-49a, 6212-50, 6212-23, 6212-58, 6212-63, 6212-64, 12960, 13195-1, 13195-3, 13422-3 and 13422-6 of the General Code; to repeal sections 5223, 5266, 5669, 6030 to 6035, both inclusive, 6067 to 6069, both inclusive, 6071, 6071-1, 6075 to 6080, both inclusive, 6085, 6086, and 6086 as amended 102 O. L., 277, 6108 to 6120, both inclusive, 6187 to 6202, both inclusive, 6205, 6212-13 to 6212-17, both inclusive, 6212-17a, 6212-17d, 6212-17e, 6212-17f, 6212-17g, 6212-18 to 6212-42, both inclusive, 6212-44 to 6212-48, both inclusive, 6212-51, 6212-54, 6212-54a, 6212-55 to 6212-57, both inclusive, 12957, 12958, 12959 and 13195-2 of the General Code; and to declare an emergency.

Be it enacted by the General Assembly of the State of Ohio:

SECTION 1. This act shall be known and may be cited as the Liquor Control Act.

As used in and for the purposes of this act:

The phrase "intoxicating liquor" includes any and all liquids and compounds which contain more than 3.2 per centum of alcohol by weight and are fit for use for beverage purposes, from whatsoever source and by whatsoever process produced, by whatsoever name called and whether

or not the same are medicated, proprietary, or patented; and any and all solids which contain any alcohol.

"Alcohol" means ethyl alcohol, whether rectified or diluted with water or not, whatever may be the origin thereof, and includes synthetic ethyl alcohol; but such term excludes denatured alcohol and wood alcohol.

"Beer" includes all beverages containing one-half of one per centum or more of alcohol by weight but not more than 3.2 per centum of alcohol by weight.

"Wine" includes all intoxicating liquors containing not more than seventeen per centum of alcohol by volume.

The term "spirituous liquor" includes all intoxicating liquors containing more than seventeen per centum of alcohol by volume.

"Department" means the department of liquor control, hereby created. "Board" means the board of liquor control, hereby created; and "director" means the director of liquor control, hereby created.

"Person" includes firms and corporations.

"Commission" means the tax commission of Ohio.

"Manufacture" includes all processes by which intoxicating liquor is produced, whether by distillation, rectifying, blending, fermentation, brewing, or in any other manner whatsoever; and "manufacturer" means any person engaged in the business of manufacturing intoxicating liquor as herein defined.

The terms "wholesale distributor" and "distributor" mean a person engaged in the business of selling to retail dealers for purposes of resale.

"Hotel" shall have the meaning defined in section 843-1 of the General Code, subject to the exceptions mentioned in section 843-3 of the General Code.

"Restaurant" means a place located in a permanent building provided with space and accommodations wherein, in consideration of the payment of money, hot meals are habitually prepared, sold and served at noon and evening, as the principal business of the place; but the meaning of said word excludes drug stores, confectionery stores, lunch stands, night clubs and filling stations.

"Club" means a corporation or association of individuals organized or formed in good faith for social, recreational, benevolent, charitable, fraternal, political, patriotic, or athletic purposes, which is the owner, lessor, or occupant of a permanent building or part thereof operated solely for such purposes and membership in which entails the prepayment of regular dues and includes the place so operated.

"Night club" means a place regularly and habitually operated for profit after the hour of midnight, where food is served for consumption on the premises and one or more forms of amusement are provided or permitted for a consideration which may be in the form of a cover charge, or may be included in the price of the food and beverages, or both, purchased by the patrons thereof.

The term "at retail" means for use or consumption by the purchaser and not for resale. The term "drug store" means an establishment as defined in section 12705 of the General Code of Ohio which is under the management or control of a legally registered pharmacist.

The term "contract carrier" includes all persons transporting intoxicating liquor or alcohol belonging to or consigned to others or intended for sale to others, otherwise than as common carriers.

SECTION 2. The department of liquor control is hereby created, to consist of a board of liquor control of four members, not more than two of whom shall be of the same political party, and a director of liquor control. The members of the board and the director shall be appointed by the governor with the advice and consent of the senate. Upon the taking effect of this act, the governor shall appoint the director, and also two members of the board, who shall not be of the same political party, for terms ending on the first Monday in February, 1935, and two for terms ending on the first Monday in February, 1937. Biennially thereafter two members shall be so appointed for terms of four years, commencing on the first Monday of February.

In the event of the death, removal, resignation, or incapacity of a member, the governor, with the advice and con-

sent of the senate, shall appoint a successor to fill the unexpired term. The governor may at any time remove any member for misfeasance, nonfeasance, or malfeasance in office.

SECTION 3. The board of liquor control shall have power:

1. To adopt and promulgate, repeal, rescind, and amend, in the manner herein required, rules, regulations, standards, requirements, and orders necessary to carry out the provisions of this act, including the following:

(a) Rules and regulations governing the management of the state liquor stores established and created by this act, and the manner of conducting them.

(b) Rules and regulations with reference to applications for and the issuance of permits, for the manufacture, distribution, transportation, and sale of beer and intoxicating liquor, and the sale of alcohol, subject to the provisions of this act; and governing the procedure of the department in the suspension, revocation, and cancellation of such permits.

(c) Rules, regulations, and orders providing in detail for the conduct of any retail business authorized under permits issued pursuant to this act, with a view to insuring compliance with the provisions of this act and other laws relative thereto, and the maintenance of public decency, sobriety, and good order in any place licensed under such permits.

(d) Standards, not in conflict with those prescribed by any law of this state, to secure the use of proper ingredients and methods in the manufacture of beer and intoxicating liquor to be sold within this state.

(e) Rules and regulations determining the nature, form, and capacity of all packages and bottles to be used for containing beer or intoxicating liquor to be kept or sold under this act, whether in state liquor stores or otherwise; and governing, consistently with the law, the form of all seals and labels to be used thereon. The board shall re-

quire the label on every package and bottle to state the ingredients in the liquor therein contained together with its age and alcoholic content.

(f) Uniform rules and regulations governing all advertising with reference to the sale of beer and intoxicating liquor throughout the state and advertising upon and in premises licensed for the sale of beer or intoxicating liquor.

(g) Rules and regulations restricting and placing conditions upon the transfer of permits.

(h) Rules, regulations, and orders limiting the number of permits of any class within the state or within any political subdivision of the state; and for such purpose adopting reasonable classifications of persons or establishments to which any class of permits provided for by this act may be issued within any such political subdivision.

(i) Rules, regulations, and orders consistent with the provisions of this act, with reference to sales of beer and intoxicating liquor on Sundays and holidays and with reference to the hours of the day during which and the persons to whom intoxicating liquor of any class may be sold, and regulations with reference to the manner of sale.

Every rule, regulation, standard, requirement or order of the board, and repeal, amendment, or rescission thereof, shall be posted for public inspection in the principal office of the department and a certified copy thereof shall be filed in the office of the secretary of state. An order applying only to a person or persons named therein shall be served on the person or persons affected, by personal delivery of a certified copy, or by mailing such certified copy to each person affected thereby, or in the case of a corporation, to any officer or agent thereof upon whom a service of summons may be served in a civil action. The posting and filing required by this act shall constitute due and sufficient notice to all persons affected by such rule, regulation, or order which is not hereby required to be served. General rules and regulations of the board adopted and promulgated pursuant to this section shall be

published in such manner as the board may from time to time determine.

2. From time to time to fix the wholesale and retail prices at which the various classes, varieties, and brands of spirituous liquor shall be sold by the department. Such retail prices shall be the same at all state liquor stores which may be established pursuant to this act. In fixing selling prices, the department may compute an anticipated gross profit of not to exceed thirty per cent, based on costs, plus the sum required by section 10 of this act to be paid into the state treasury. Provided, however, that on spirituous liquor manufactured in Ohio from the juice of grapes grown in Ohio the department shall compute an anticipated gross profit of not to exceed ten per cent.

3. To approve and adopt all forms for use in the administration of this act, excepting those relating to taxation.

4. For the purposes of this act, excepting the penal provisions thereof, to interpret and clarify any term in this act, whenever it may be found that such interpretation or clarification is required for the purpose of certainty, and to carry out the manifest policy of this act.

5. To consider, hear, and determine all appeals authorized by this act to be taken from any decision, determination or order of the department. The board shall accord a hearing to any person so appealing, in which such person shall have the right to be present, to be represented by counsel, to offer evidence, and to require the attendance of witnesses. In any such case, the decision of the board, made after such hearing, shall be final.

6. To adopt, repeal, and amend by-laws in relation to its meetings and the transaction of its business and regulating its procedure on appeal, consistently with the provisions of this act.

7. To consider and make recommendations upon any matter which the director may submit to it for recommendation and to pass upon and determine any matter which he shall submit to it for determination.

8. To require of the director and of any officer, department, board, or commission of the state government or of any county, township, or municipal officer in this state, information with respect to the social and economic effects of this act; and all such officers, departments, boards, and commissions are hereby required to furnish such information when requested in writing by the board.

9. To submit to the governor amendments to this act or any other act affecting the sale of intoxicating liquor in this state when it deems desirable.

10. For the purpose of any hearing or investigation which it is authorized or required by this act to conduct, the board or its director as its executive secretary, or any agent of the department designated in writing for that purpose, shall have power to administer oaths, take depositions, issue subpœnas, compel the attendance of witnesses and the production of books, accounts, papers, records, documents, and testimony. In case of disobedience of any person to comply with the order of the board or a subpœna issued by the board, or any of its members, the director, or such agent, or on the refusal of a witness to testify to any matter regarding which he may be lawfully interrogated, the common pleas judge of the county in which the person resides, on application of any member of the board, or its director, shall compel obedience by attachment proceedings as for contempt, as in the case of disobedience of the requirements of a subpœna issued from such court or a refusal to testify therein. Each officer who serves such subpœna shall receive the same fees as a sheriff and each witness who appears, in obedience to a subpœna, before the board, or a member, or the director, shall receive for his attendance the fees and mileage provided for witnesses in civil cases in courts of common pleas, which shall be audited and paid in the same manner as other expenses are audited and paid, upon the presentation of proper vouchers, approved by any two members of the board. No witness subpœnaed at the instance of a party other than the board, or one of its members, or the director, or such agent, shall be entitled to

compensation unless the board shall certify that his testimony was material to the matter investigated.

The foregoing enumeration of powers of the board of liquor control shall not derogate from or prejudice any other power expressly or impliedly granted to the board by any other provision of this act; but excepting as herein expressly provided, the board shall not have or exercise executive or administrative duties or powers.

SECTION 4. The board of liquor control shall annually choose its own chairman. It shall from time to time compile and cause to be published in reasonable detail, information as to its financial and other operations; and shall hold not less than four public hearings annually for the purpose of hearing general complaints as to its policies under this act, receiving suggestions with respect thereto, and for the dissemination of information to the public. All of the records of the proceedings of the department shall be open to public inspection.

SECTION 5. The director of liquor control and each member of the board of liquor control shall devote his entire time to the duties of his office and shall hold no other position of trust or profit. No member of the board of liquor control, nor the director, nor any of the appointees or employees of the department, shall have any financial interest, directly or indirectly, in the manufacture, distribution, or sale of beer or intoxicating liquor.

Each member of the board of liquor control shall receive an annual salary of four thousand five hundred dollars, together with his actual and necessary traveling expenses incurred in the performance of his official duties.

The director of liquor control shall receive an annual salary of six thousand five hundred dollars and his actual and necessary traveling expenses incurred in the performance of his official duties.

SECTION 6. Each member of the board of liquor control, and the director of liquor control, shall, before entering upon the duties of his office, take and subscribe the constitutional oath of office and give bond to the state of Ohio

in the amount of one hundred thousand dollars, conditioned according to law, with surety to the approval of the governor. Such bond shall be filed and kept in the office of the secretary of state. The director may require any employee of the department to give like bond in such amount as the board may prescribe, with surety to the satisfaction of the board, which shall be filed and kept in the office of the department. The premium, if any, on any bond required or authorized by this section may be paid from the moneys received for the use of the department under authority of this act or from appropriations made by the general assembly.

SECTION 7. The director of liquor control shall be the executive secretary of the board of liquor control. Subject only to the powers and duties of the board as set forth in section 3 of this act, all the powers and duties by this act vested in or imposed upon the department shall be exercised and performed by the director, who shall administer the affairs of the department, excepting as otherwise specified in this act.

SECTION 8. The department of liquor control shall have all the powers and duties vested in and imposed upon a department of state administration by sections 154-17, 154-18, 154-19 and 154-22 of the General Code; and all the powers of the board of liquor control which shall be exercised by the board in the name of the department. In addition thereto, the department shall have and exercise the following powers:

1. To control the traffic in beer and intoxicating liquor in this state, including the manufacture, importation, and sale thereof, as in this act provided.

2. To grant, refuse, suspend, revoke and cancel permits for the manufacture, distribution, transportation and sale of beer and intoxicating liquor and the sale of alcohol, as authorized or required by this act.

3. To put into operation, manage and control a system of state liquor stores for the sale of spirituous liquor at

retail and to holders of permits authorizing the sale of such liquor, to be established throughout the state as hereinafter provided; and thereby and by means of such manufacturing plants, distributing and bottling plants, warehouses and other facilities as it may deem expedient in connection therewith, to establish and maintain a state monopoly of the distribution of such liquor and the sale thereof in packages or containers; and for such purpose to manufacture, buy, import, possess, and sell spirituous liquors in the manner provided in this act and in the regulations adopted and promulgated by the board pursuant to this act; to lease or in any manner except by purchase, acquire the use of any land or building required for any of such purposes; to purchase such equipment as may be required to effectuate the purposes of this act; to borrow money to inaugurate and carry on its business, and to issue, sign, endorse, and accept, notes, checks, and bills of exchange; but any and all obligations of the department created under authority of this paragraph shall be a charge only upon the moneys received by the department from the sale of spirituous liquor pursuant to this act and its other business transactions in connection therewith, and shall not be general obligations of the state of Ohio.

4. To enforce the provisions of this act and the rules, regulations, and orders of the board of liquor control and the penal laws of this state relating to the manufacture, importation, transportation, distribution, and sale of beer and intoxicating liquors. The attorney general, any prosecuting attorney, and any prosecuting officer of a municipal corporation or a police or municipal court, shall at the request of the department prosecute any person charged with the violation of any of the penal provisions of this act or of any section of the General Code relating to the manufacture, importation, transportation, distribution and sale of beer and intoxicating liquor.

5. Subject to the provisions of this act, to determine the locations of all state liquor stores and manufacturing, distributing and bottling plants required in connection therewith.

6. For the purpose of carrying out the provisions of this section, to determine the retail selling price as defined in this act of each brand and class of wine offered for sale in this state. The determinations of the department under this paragraph shall be certified to the tax commission of Ohio and shall be posted, filed, and published in the manner provided in section 3 of this act with respect to rules, regulations and orders of the board of liquor control. The commission and all persons whose duty it is under this act to affix stamps for the payment of the tax on the sale of wine, imposed by this act, shall be guided by such determinations in the administration and observance of said taxing provisions. Any holder of a permit deeming himself aggrieved thereby may appeal from the determination of the department to the board of liquor control, whose decision thereon shall be final.

7. For the purpose of carrying out the provisions of this act and enforcing the laws of this state relating to the manufacture, importation, transportation, distribution and sale of beer and intoxicating liquor, and the sale of alcohol, to inspect, upon demand, the books, accounts, records, and memoranda, or either, of any person subject to the provisions of this act or such laws and the place where the business of such person is conducted.

8. To delegate to any of its agents or employees any power of investigation and inquiry which the department may possess; and the powers of police officers with respect to the enforcement of any of the penal laws of this state relating to beer and to intoxicating liquor. Except in his report to the department or when called upon to testify in any court or proceeding, any such agent or employer who shall divulge any information acquired by him with respect to the transactions or the business of any person while acting as such agent or employee, shall be fined not less than fifty dollars and not more than one thousand dollars and shall thereafter forever be disqualified from acting as agent or in any other capacity under the appointment or employment of the department.

9. All other powers expressly or by necessary implication conferred upon the department by any provisions of this act; and all powers necessary and proper for the exercise or discharge of any power, duty or function expressly conferred or imposed upon the department by any provision of this act.

The department of liquor control shall be a body corporate with capacity in such name to sue and be sued, to make and enter into leases and contracts of all descriptions within the scope of its functions as defined in this act, and to acquire and transfer title to personal property. The department of liquor control may terminate at will any lease entered into pursuant to this act upon first giving ninety days' notice in writing to the lessor of its intention so to do.

All contracts of lease for a state liquor store entered into by the department shall be made in writing with the lowest and best bidder after an advertisement in a newspaper of general circulation in the community wherein it is proposed to establish such store. In determining which is the lowest and best bid the department shall have consideration for the length of lease, location, size, character, quality of construction and general fitness for use as such store of the premises for which a bid is submitted.

The board shall have the power to prescribe the form of bid and shall prescribe rules and regulations pertaining to the receiving of same and the advertisement thereof; provided, however, that before accepting a bid and before entering into any contract of lease of the premises for use as a state liquor store the department shall cause to be published in a newspaper of general circulation in the community wherein such premises are located a synopsis of the terms of such proposed lease including name of lessor, location of premises and yearly rental therefor. If such newspaper is a weekly publication only such synopsis shall be published on one occasion. If such newspaper is a daily publication such synopsis shall be published on three successive days.

The department may reject any or all bids. If it rejects all bids it shall then proceed to readvertise for bids for

such leases and may continue to readvertise for such bids until a bid or bids are received made to the satisfaction of the department in conformity to the provisions of this act and the rules and regulations of the board pertaining thereto.

No member of the board, or any officer or employe of the department shall either directly or indirectly have any interest in any contract of lease entered into by the department.

SECTION 9. All moneys received from the sale of liquor at state liquor stores or otherwise, or arising in the administration of this act, other than from taxes, shall be paid to the department of liquor control and shall be accounted for and paid over by the department to the treasurer of state as custodian, in the manner provided by section 10 of this act.

SECTION 10. The department shall by regulation provide for the custody, safekeeping, and deposit of all moneys received by it or any of its employees or agents on its behalf; but the department shall pay to the treasurer of state all moneys, checks, and drafts received for the department or for the state, at the time and in the manner provided by sections 24, 24-3, and 24-4, of the General Code, subject to contingent withdrawal in the manner provided by section 24-5 of the General Code. For emergency or petty expenditures, if the director of finance approves, the auditor of state shall issue to the department of liquor control a warrant for petty cash, from the funds in the custody of the treasurer of state for the use of the department, in the amount recommended and approved by the director of finance. The department shall render to the auditor of state and to the director of finance a detailed account of the expenditures of such petty cash, classified as the director of finance shall prescribe, and shall report when requested by the director of finance the balance of petty cash on hand at any time. Thereafter upon written recommendation of the director of finance the auditor of state shall issue warrants to such department to replace petty cash lawfully expended, but not to increase the aggregate

of such petty cash at any time above the amount approved by the director of finance. In any event (a) a sum equal to one dollar for each gallon of spirituous liquor sold by the department during the period covered by the payment shall be paid into the state treasury to the credit of the general revenue fund in the manner provided by law; and (b) all moneys received from permit fees shall be so paid to the treasurer of state and a separate account thereof shall be kept by the department, the auditor of state, and the treasurer of state. The treasurer of state shall be the custodian of all moneys collected by the department excepting such moneys as are required by this act to be paid by the department into the state treasury. Within ten days after this act shall take effect, the treasurer of state shall give a separate and additional bond, in such amount as may be fixed by the governor, and with sureties to his approval, conditioned for the faithful performance of his duties as custodian of such moneys. Such bond shall be deposited with the secretary of state and kept in his office. Thereafter, the official bond of the treasurer of state and such additional bond or bonds as may be required of the treasurer of state under the provisions of section 298 of the General Code, shall be liable for the proper discharge of the duties of the treasurer of state as custodian of such moneys. All such moneys shall be deposited in the same manner and subject to all the provisions of law with respect to the deposit of state funds by the treasurer of state: and all interest earned by such deposits shall be collected by him and added to the principal thereof.

The moneys in the custody of the treasurer of state for the use of the department of liquor control shall be known as the "liquor control rotary fund" and shall be disbursed on the order of the auditor of state, in form prescribed by him, on the treasurer of state as custodian as aforesaid, pursuant to vouchers or invoices signed by the director of the department of liquor control, in such form as the auditor of state shall prescribe. The cost of examinations by state examiners of the bureau of inspection and supervision of public offices rendered to the department of liquor control, shall be charged against the moneys in the custody

of the treasurer of state for the use of the department, by the auditor of state on statements rendered quarterly for services rendered during the preceding quarter.

Whenever, in the judgment of the board, the amount in the custody of the treasurer of state to the credit of the liquor control rotary fund is in excess of that needed to meet the maturing obligations of the department and as working capital for its further operations, the board shall certify the amount of such excess to the department of finance, together with such other facts and information as the department of finance may require. Thereupon the department of finance shall examine the records of the department of liquor control and determine therefrom and from any other facts or information coming to its knowledge, the amount, if any, of such excess. The amount so determined by the department of finance shall be certified to the department of liquor control and to the auditor of state, and the auditor of state shall thereupon issue an order on the treasurer of state as custodian of moneys collected under this act for the amount thereby determined, to the general revenue fund of the state and a pay-in order in like amount, in the manner provided by law.

SECTION 11. Subject to the local option provisions of this act, one state liquor store shall be established in each county; and one additional store may be established in any county for each forty thousand of population of such county or major fraction thereof in excess of the first forty thousand, according to the last preceding federal census. In any location in which the department may deem it inadvisable to establish and maintain a state liquor store as a separate establishment, and in every municipality in which there is no such state liquor store, the department may appoint a person who is engaged in a mercantile business thereat as its agent for the sale of spirituous liquor and fix his compensation, which shall be in the form of an annual salary and not otherwise. The department shall require every such agent to give bond with surety to the satisfaction of the department, in such amount as the department may fix, conditioned for the faithful performance of his

duties as prescribed by the department. The department may purchase spirituous liquor in barrels, casks, or other containers, and may establish a plant or plants for the manufacture of spirituous liquor or for the blending and bottling of such liquor. All spirituous liquors manufactured, blended or bottled by the department must be so labeled.

SECTION 12. The department shall sell spirituous liquor only, whether from a warehouse or from a state liquor store. All sales shall be in sealed containers and for resale as authorized by this act or for consumption off the premises only. The department shall not sell on credit. Deliveries shall be made in such manner as the board of liquor control by rule or regulation may determine.

The department shall list for sale the products of any manufacturer requesting it, and whose products can legally be sold in Ohio through the state liquor stores. Such stores shall carry a consigned stock of those manufacturers, who so request it, and any intoxicating liquors shall be sold on consignment to this state. All such liquor so consigned in state liquor stores shall be held at the risk of the consignor.

All purchasers of spirituous liquor from the department shall be required to fill out a prescribed form of purchase order, stating the quantity and kind desired, together with the name and address in writing of such purchaser.

If any person shall desire to purchase any variety or brand of spirituous liquor which is not in stock at the state liquor store where the same is ordered, the department shall immediately procure the same, by order or otherwise, upon the making of a reasonable deposit by the purchaser in such proportion of the approximate cost of the order as shall be prescribed by the rules or regulations of the board. The customer shall be immediately notified upon the arrival of the spirituous liquor so ordered at the store at which it was ordered. Unless he pays for the same and accepts delivery thereof within five days after the giving of such notice, the department may place such spirituous liquor in stock for general sale, and the deposit of the customer shall be forfeited.

SECTION 13. Nothing in this act shall be construed to prevent the storage of intoxicating liquor in bonded warehouses established in accordance with the acts of congress and the regulations of the government of the United States, located in this state, or the transportation of intoxicating liquor to or from bonded warehouses of the United States wherever located; or to prevent a bona fide resident of this state who is the owner of a warehouse receipt from obtaining or transporting to his residence for his own consumption and not for resale spirituous liquor stored in a bonded warehouse, either in this state or in another; or the manufacture of cider from fruit, for the purpose of making vinegar, and non-intoxicating cider and fruit juice for use and sale; or to prevent a duly licensed physician or dentist from administering or dispensing intoxicating liquor or alcohol to a patient in good faith in the actual course of the practice of his profession; or to prevent the sale of alcohol to physicians, dentists, druggists, veterinary surgeons, manufacturers, hospitals, infirmaries, medical or educational institutions using the same for medicinal, mechanical, chemical or scientific purposes; or the sale or gift or keeping and storing for sale by druggists and others of any of the medicinal preparations manufactured in accordance with the formulas prescribed by the United States pharmacopoeia and national formulary, patent or proprietary preparations, and other bona fide medicinal and technical preparations, which contain no more alcohol than is necessary to hold the medicinal agents in solution and to preserve the same, which are manufactured and sold as medicine and not as beverages, are unfit for use for beverage purposes, and the sale of which does not require the payment of a United States liquor dealer's tax; or to prevent the manufacture and sale of tincture or of toilet, medicinal, and antiseptic preparations and solutions not intended for internal human use nor to be sold as beverages, and which are unfit for beverage purposes, if upon the outside of each bottle, box or package of which there is printed in the English language, conspicuously and legibly, the quantity by volume of alcohol in such preparation or solution; or the manufacture and keeping for sale of the food products

known as flavoring extracts when manufactured and sold for cooking, culinary or flavoring purposes, and which are unfit for use for beverage purposes; or the lawful sale of wood alcohol or of ethyl alcohol for external use when combined with such other liquids, or substances, as to make it unfit for internal use.

SECTION 14. No person shall directly or indirectly, himself or by his clerk, agent, or employe, manufacture, manufacture for sale, keep or possess for sale, furnish or sell any beer or intoxicating liquor in this state, or sell at retail any alcohol in this state, or transport or import any beer or intoxicating liquor or alcohol in or into this state for delivery or use herein, unless such person shall have fully complied with the provisions of this act and shall be the holder of a permit issued by the department of liquor control and in force at the time.

SECTION 15. The following classes of permits may be issued:

Permit A-1: A permit to a manufacturer to manufacture beer and other malt liquor containing not more than six percentum of alcohol by weight and sell such product in bottles or other containers for home use and to retail and wholesale permit holders under such regulations as may be promulgated by the department. The fee for this permit shall be computed on the basis of the annual production of each plant; the initial fee shall be one thousand dollars for each plant producing five thousand barrels or less annually, and said initial fee shall be increased at the rate of five cents per barrel for all beer manufactured in excess of five thousand barrels during the year covered by the permit.

Permit A-2: A permit to a manufacturer to manufacture wine and sell such product either in glass or container, for consumption on the premises where manufactured, for home use and to retail permit holders in sealed containers only, and to wholesale permit holders under such regulations as may be promulgated by the department. The fee

for this permit shall be twenty dollars for each plant producing one hundred wine barrels, of fifty gallons each, or less annually; and said initial fee shall be increased at the rate of ten cents per such barrel for all wine manufactured in excess of one hundred barrels during the year covered by the permit.

Permit A-3: A permit to a manufacturer to manufacture spirituous liquor and sell such product to the department only, to import into this state spirituous liquor for blending or other manufacturing processes, and to export from this state spirituous liquor in bulk or otherwise for sale outside this state. The fee for this permit shall be one thousand dollars for each plant; but in case of a plant producing less than five hundred wine barrels of fifty gallons each, annually, the fee shall be at the rate of two dollars per barrel.

Permit B-1: A permit to a wholesale distributor of beer to bottle, distribute, or sell such product for home use and to class C-1, class D-1, D-4, D-5, class E and class F permit holders under such regulations as may be promulgated by the department. The fee for this permit shall be computed on the basis of annual sales and distribution of beer. The initial fee shall be one thousand dollars for each distributing plant or warehouse and said initial fee shall be increased at the rate of five cents per barrel for all beer distributed and sold in Ohio in excess of five thousand barrels during the year covered by the permit.

Permit B-2: A permit to a wholesale distributor of wine to bottle, distribute or sell such product for home use and to class C-2, class D-2, D-4, D-5, and class E permit holders, in sealed containers only. The fee for this permit shall be five hundred dollars for each distributing plant or warehouse; and said initial fee shall be increased at the rate of ten cents per wine barrel of fifty gallons for all wine distributed and sold in Ohio in excess of twelve hundred and fifty such barrels during the year covered by the permit.

Permit B-3: A permit to a wholesale distributor of wine to bottle, distribute or sell sacramental wine for religious

rites upon applications signed, dated and approved in the manner required for the purchase of wine for such purposes under class G permits by the fourth sub-paragraph of section twenty-two of this act. The fee for this permit shall be twenty-five dollars.

Permit C-1: A permit to the owner or operator of a retail store to sell beer in sealed containers only and not for consumption on the premises where sold, in original packages containing not less than one container and in total quantities at each sale of not more than five hundred seventy-six fluid ounces. The fee for this permit shall be fifty dollars for each location.

Permit C-2: A permit to the owner or operator of a retail store to sell wine in sealed containers only and not for consumption on the premises where sold, in original packages containing not less than one container and in total quantities at each sale of not more than three hundred eighty-four fluid ounces. The fee for this permit shall be fifty dollars for each location.

Permit D-1: A permit to the owner or operator of a hotel or restaurant licensed pursuant to section 843-2 of the General Code, or of a club, amusement park, drug store, lunch stand, boat or vessel, to sell beer at retail either in glass or container, for consumption on the premises where sold; and to sell beer at retail in other receptacles or in original packages containing not less than one container and in total quantities at each sale of not more than 96 fluid ounces and not for consumption on the premises where sold. The fee for this permit shall be one hundred dollars for each location, boat or vessel.

Permit D-2: A permit to the owner or operator of a hotel or restaurant licensed pursuant to section 843-2 of the General Code, or of a club, boat, or vessel, to sell wine at retail, either in glass or container, for consumption on the premises where sold, only at tables where meals are served. The fee for this permit shall be one hundred dollars for each location, boat or vessel.

Permit D-3: A permit to the owner or operator of a hotel or restaurant licensed pursuant to section 843-2 of the General Code, or a club, boat or vessel, to sell spirituous liquor at retail, in glass and from the container, for consumption on the premises where sold, only at tables where meals are sold. The fee for this permit shall be four hundred dollars for each location, boat or vessel.

Permit D-4: A permit to a club which shall have been in existence for a period of three years or more prior to the issuance thereof, to sell beer and any intoxicating liquor to its members only, in glass or container, for consumption on the premises where sold. The fee for this permit shall be one hundred dollars.

Permit D-5: A permit to the owner or operator of a night club to sell beer and any intoxicating liquor, at retail, in glass and from the container, for consumption on the premises where sold, only at tables where meals are served. The fee for this permit shall be one thousand dollars.

Permit E: A permit to the owner or operator of any railroad or to a sleeping car company, operating dining cars, buffet cars, club cars, lounge cars or similar equipment, to sell beer or any intoxicating liquor in any such car to bona fide passengers at retail in glass and from the container for consumption in such car. The fee for this permit shall be fifty dollars.

Permit F: A permit to any bona fide charitable organization to sell beer for any special function lasting for a period not to exceed five days. The fee for this permit shall be five dollars.

Permit G: A permit to the owner of a drug store in charge of a registered pharmacist to be named therein, for the sale of any intoxicating liquor or alcohol upon the written prescription of a physician or dentist who is lawfully and regularly engaged in the practice of his profession in this state; for the sale of any intoxicating liquor for medicinal, mechanical, chemical or scientific purposes, to any hospital, infirmary, medical or educational institution where such liquors are used only for medicinal, mechanical,

chemical or scientific purposes; for the sale of any intoxicating liquor to any physician or dentist who is lawfully engaged in the practice of his profession in this state, for use in his practice; physician, dentist or veterinary surgeon who is lawfully engaged in the practice of his profession in this state, for use in his practice; for the sale of wine for the sacramental purposes of any church or other religious body, to any recognized official thereof; and for the sale of alcohol for mechanical, chemical or scientific purposes to a person known by the seller to be engaged or employed in such mechanical, chemical or scientific pursuits; all subject to the provisions of this act relative to such sales. The fee for this permit shall be twenty-five dollars.

Permit H: A permit to a common carrier or a contract carrier to transport or import beer, intoxicating liquor or alcohol, or any or all of them, in this state, for delivery or use in this state. The fee for this permit shall be five dollars.

All initial fees prescribed by this section shall be paid when permits are issued; all other fees shall be paid at such time or times and in such manner as may be prescribed by the department. The board of liquor control may adopt and promulgate rules and regulations requiring reports or returns for the purpose of determining the amounts of such additional permit fees, and the basis of determining the amounts of class E permit fees.

Section 15a. Upon the taking effect of this act the state board of pharmacy shall issue to any wholesale distributor who is the holder of a class B permit heretofore or hereafter issued by the 'Ohio liquor control commission' or by the department, or to any wholesale distributor or owner or operator of a retail drug store in this state who has been duly authorized by the Federal government to distribute or to sell intoxicating liquor under the national prohibition act, a temporary permit to distribute and sell, or to sell, as the case may require, intoxicating liquor and alcohol until the expiration of sixty days after this act shall take effect. The fee for this permit shall be fifty dollars, which

when collected shall be paid by the board to the treasurer of state as custodian of the undivided liquor permit fund created by this act; provided, however, that holders of permits issued by the 'Ohio liquor control commission' or by the department shall not be required to pay such fee. Such temporary permits shall be issued only on application and exhibition of the permit or other evidence of authority issued by the proper authority of this state or department of the government of the United States and payment of such permit fee as is hereby required, and shall be limited to the person and place named in such evidence of authority. The board of pharmacy shall upon application also issue a temporary permit to any retail drug store in charge of a registered pharmacist and doing business as such on December 15, 1933. Such temporary permits shall have the force and effect of a permit issued by the department under authority of this act and shall be subject to revocation, suspension or cancellation by the department as provided in this act. Such a temporary permit issued to the owner or operator of a retail drug store shall entitle the holder thereof, during the period herein mentioned, to sell any intoxicating liquor in sealed containers only and not for consumption on the premises where sold, in original packages containing not less than one container, and in total quantities at each sale of not more than three hundred eighty-four fluid ounces, and to sell sacramental wine and alcohol under the restrictions specified in section 23 of this act for the sale of such wine and alcohol. As soon as the department of liquor control shall be organized and upon request of the director thereof, the state board of pharmacy shall certify to the department and to the commission a list showing the names and addresses of the holders of all temporary permits issued by said board, and the type of permit issued to each; and thereafter, during said period of sixty days, the board shall, upon the issuance of any such temporary permit, forthwith certify the facts with respect thereto to the department and to the commission.

It shall be unlawful for the holder of a temporary retail permit issued under this section, either directly or indirectly, to solicit the sale of intoxicating liquor or alcohol

through advertising or otherwise; or to display intoxicating liquor in windows or to display such liquor conspicuously at any place within his store; provided, however, that nothing in this paragraph shall be construed to prohibit the display within a store of not more than three printed announcements of a size not exceeding forty-eight inches square with the wording: "This store is temporarily licensed to sell intoxicating liquor at retail"; nor the posting within a store in a printed announcement of like size of a list of the brands of intoxicating liquor offered for sale therein, and the prices charged for the same. Whoever violates any provision of this paragraph shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined not less than ten dollars nor more than fifty dollars; and such conviction shall work a forfeiture of such temporary permit and render the person convicted ineligible to receive or hold any type of permit authorized by this act.

The department of liquor control may at any time within the sixty day period specified in this section, by written order promulgated as provided in this act, extend any or all temporary permits issued pursuant to this section for a further specified period not exceeding sixty days after the expiration of said original sixty day period; but all such extensions shall be subject to cancellation at any time within said period of extension on ten days' notice given by the department by mail to the holder or holders thereof.

The issuance of the temporary permits provided for in this section shall be subject to the applicable provisions of sections 17 and 20 of this act, and retail sales thereunder shall be subject to the applicable provisions of section 22 of this act. The provisions of sections 18, 24 and 43 of this act shall not apply to holders of such temporary permits.

A tax is hereby imposed on the sale of intoxicating liquor at retail by the holders of temporary permits issued under this section at the rate of ten per centum of the gross receipts derived from such sales, for the use of the general revenue fund of the state. The tax commission of Ohio shall have power to adopt rules and regulations prescrib-

ing the manner of making returns, the form thereof, and the time of filing the same and paying the tax hereby imposed. Upon determining the amount of such tax due from any holder of such permit the commission shall certify such amount in duplicate to the auditor of state and to the treasurer of state. The treasurer of state shall notify such person charged with such tax of the amount thereof and such person shall pay such amount to the treasurer of state within ten days after the giving of such notice. If any holder of a permit issued under this section fails to make a return as required by the rules and regulations of the commission, or makes a false or incorrect return, the commission shall have and exercise all powers vested in it by any law of this state relating to taxation for the purpose of ascertaining the gross receipts of such permit holder from sales of intoxicating liquor subject to the tax hereby imposed and shall certify any omitted taxes so ascertained, together with the penalty herein prescribed, to the auditor of state and the treasurer of state as provided in this section.

The following penalties are hereby imposed: For failure to make return or making false return, fifteen per centum of the amount determined by the commission pursuant to this section; for failure to pay the tax hereby imposed at the time the same is due, fifteen per centum of the amount charged, to be assessed by the auditor of state. Any such taxes and penalties remaining unpaid shall be certified by the treasurer of state to the attorney general for collection; and the same may be collected by civil action in the name of the state in any court of competent jurisdiction.

SECTION 16. Applications for regular permits authorized by this act may be filed with the department of liquor control at any time after this act becomes effective. No permit shall be issued by the department under authority of this act until fifteen days after the application therefor is filed.

SECTION 17. No permit, other than a class H permit, shall be issued to a firm or partnership unless all of the members of said firm or partnership are citizens of the United States

and a majority thereof have resided in this state for one year prior to application therefor; nor shall a permit, other than a class H permit, be issued to an individual unless he is a citizen of the United States who has resided in this state for at least one year prior to application therefor; nor shall any permit other than a class E or class H permit be issued to any corporation organized under the laws of any country, territory, or state other than Ohio until it shall first have furnished the department with evidence that it has complied with the laws of this state relating to the transaction of business in this state.

No person theretofore convicted of conspiracy, manufacturing, distributing, transporting, importing, possessing or selling intoxicating liquor in violation of the state or Federal prohibition laws, or of any felony, shall receive or be permitted to retain any permit under this act: nor shall any such person have an interest, directly or indirectly, in any permit authorized to be issued under this act. No holder of a permit shall sell, assign, transfer, or pledge the permit granted, without the written consent of the department of liquor control.

No more than one of each type of class C or class D prmit shall be issued to any one person, firm or corporation in any county having a population of less than fifty thousand, and no more than one of each type of class C or class D permit to any one person, firm or corporation for any additional fifty thousand or major fraction thereof in any county having a greater population than fifty thousand.

No class D-3 permit shall be issued to any club unless such club was engaged in the activity specified in this act as a qualification for such class of permit, on the first day of January, 1932; or unless such club shall, at the time such permit is issued, have been continuously engaged in such activity for two years.

Not more than one class D-3, class D-4 or class D-5 permit shall be issued for each two thousand population, or part thereof, in any county, city or village. No class D-3, class D-4 or class D-5 permit shall be issued in any municipal corporation, or in any township exclusive of

any municipal corporation or part thereof therein, in which at the November, 1933, election a majority of the electors voting thereon voted against the repeal of section 9 of article XV of the Ohio constitution, unless the sale of spirituous liquor by the glass shall be authorized by a majority vote of the electors voting on the question in such municipal corporation or township or part thereof, hereinafter in this section designated as the liquor control district at an election held pursuant to this section or by a majority vote of the electors of the liquor control district voting on question (d) at a special local option election held in such district pursuant to section 33 of this act.

Upon the petition of fifteen per cent of the number of voters voting for governor at the last election in any such liquor control district, filed with the board of elections of the county in which such political subdivision or part thereof is located sixty days before a general election, such board of elections shall cause ballots to be prepared and hold an election at such general election upon the question of allowing spirituous liquor to be sold by the glass in such liquor control district. Such ballots shall be approved in form by the secretary of state. The results of such election shall be certified by the board of elections to the secretary of state, who shall certify the same to the state department of liquor control.

Within thirty days after this act shall take effect, the secretary of state shall prepare and certify to the department of liquor control a complete list of all the municipal corporations and townships and parts thereof in which, at the November, 1933 election, a majority of the electors voted against the repeal of section 9 of article XV of the Ohio constitution.

No holder of a class D-3 permit issued for a boat or vessel shall sell spirituous liquor in any municipal corporation or township or part thereof, in which the election provided for in this section is authorized to be held, unless the sale of such liquor by the drink shall have been authorized therein by vote of the electors as provided in this section or in section 33 of this act.

SECTION 18. No permit, other than a class F permit, shall be issued unless and until the applicant therefor shall have furnished a bond to the state of Ohio, with surety to the satisfaction of the commission, conditioned on the faithful observance of the terms of the particular class of permit and compliance with all laws of the state of Ohio and rules, regulations, and orders of the department of liquor control and the tax commission of Ohio with respect thereto. The penal sums of such bonds for the classes of permits designated shall be fixed by the department of liquor control within the following limitations, to-wit:

1. For all class A permits, not less than two thousand dollars nor more than ten thousand dollars.

2. For all class B permits, not less than five thousand dollars nor more than twenty-five thousand dollars.

3. For all class C, class D, class E, class G and class H permits, not less than one hundred dollars nor more than one thousand dollars.

Such bonds shall be filed with the commission and kept in its office.

The tax commission of Ohio or the treasurer of state shall notify the surety on any bond required under the provisions of any section of the liquor control act of any delinquency on the part of any permit holder in the payment of a tax within ten days after such tax was due and payable. If the surety shall pay such tax within thirty days after the receipt of such notice no penalty or interest thereon shall be charged against the surety. In the event that the surety does not pay such tax within thirty days but makes payment within ninety days from the date of the receipt of such notice no penalty shall be assessed against the surety but the surety shall pay interest at the rate of six per-centum per annum on the unpaid taxes from the date said taxes were due and payable. In the event the surety does not pay within ninety days then the surety shall be liable for interest and penalties.

In the event that liability upon the bond filed by the permit holder with the tax commission shall be discharged

or reduced, whether by judgment rendered, payment made or otherwise, or if in the opinion of the commission any surety on the bond theretofore given shall have become unsatisfactory, or unacceptable, then the commission may require the permit holder to file a new bond with satisfactory sureties in the same amount, failing which the commission shall forthwith certify the fact to the department, which shall forthwith cancel the permit. If such new bond shall be furnished by said permit holder as above provided, the tax commission shall cancel and surrender the bond of said permit holder for which such new bond shall be substituted.

In the event that upon hearing, of which the permit holder shall be given five days' notice in writing, the commission shall decide that the amount of the existing bond together with the permit holder's known assets is insufficient to insure payment to the state of Ohio of the amount of the tax for which said permit holder is or may become liable during any month, then the permit holder shall forthwith, upon the written demand of the tax commission, file an additional bond in the same manner and form with sureties satisfactory to the commission in any amount determined by the commission not in excess of the maximum amount of twenty-five thousand dollars, failing which the tax commission shall forthwith certify the fact to the department, which shall forthwith cancel the permit.

Any surety on any bond furnished by any permit holder as above provided shall be released and discharged from any and all liability to the state of Ohio accruing on such bond after the expiration of sixty days from the date upon which such surety shall have lodged with the secretary of the tax commission written request to be released and discharged. Provided, however, that such request shall not operate to relieve, release or discharge such surety from any liability already accrued, or which shall accrue, before the expiration of said sixty-day period. The tax commission shall promptly on receipt of notice of such request notify the permit holder who furnished such bond and, unless such permit holder shall on or before the expiration of such sixty-day period file with the tax commission a new

bond with a surety or sureties satisfactory to the tax commission in the amount and form hereinbefore in this section provided, the commission shall forthwith certify the fact to the department, which shall forthwith cancel the permit. If such new bond shall be furnished by said permit holder as above provided, the tax commission shall cancel and surrender the bond of said permit holder for which such new bond shall be substituted.

The provisions of this section with respect to the cancellation and surrender of bonds, the requirement of additional bonds, and the release and discharge of sureties on bonds shall apply to any bond required by the department of any of its agents or employees; and the department shall, with respect to such bonds, have all the powers and discharge of the duties conferred and imposed upon the commission by the provisions of this section.

The bonds required hereunder shall run concurrently with the license. The liability of the surety under such bonds or any bonds required by this act for any default of the principal shall be limited to the amount of actual damages sustained on account of such defaults and the liability of the surety for all damages sustained on account of all default occurring during the entire effective period of the bond shall not exceed in the agregate the penal sum thereof.

SECTION 19. No holders of class C permits, nor of class D-1, or class D-2, class D-4 or class D-5 permits, nor of class F permits, shall purchase any beer or wine for resale, excepting from holders of class A or class B permits, unless with the special consent of the department.

No holders of class D-3, class D-4 or class D-5 permits nor of class G permits shall purchase spirituous liquor for resale, excepting from the department, unless with the special consent of the department.

SECTION 20. Each class and kind of permit issued under authority of this act shall authorize the person therein named to carry on the business therein specified at the place or in the boat, vessel or classes of dining car equipment therein described, for a period of one year commencing on the day after the date of its issuance, and no longer, sub-

ject to suspension, revocation or cancellation as authorized or required by this act; and no such permit shall be deemed to authorize the person named therein to carry on the business therein specified at any place or in any vehicle, boat, vessel or class of dining car equipment other than that named therein, nor to authorize any person other than the one therein named to carry on such business at the place or in the vehicle, boat, vessel or class of dining car equipment named therein; excepting in either case, pursuant to compliance with the rules, regulations, and orders of the department of liquor control governing the assignment and transfer of permits, and with the consent of the department as herein provided; and excepting further in case of class G permits, the holder thereof may substitute the name of another registered pharmacist for that entered on the permit, subject to rules and regulations of the department.

Nothing in this act shall be so construed as to prohibit the holder of a class A or class B permit from selling or distributing beer or intoxicating liquor to a person at a place outside of this state, nor to prohibit the holder of any such permit or a class H permit from delivering any beer or intoxicating liquor so sold from a point in this state to a point outside of this state.

Section 21. The sale of beer or intoxicating liquor for consumption on the premises, under permits authorizing such sale, shall be subject to the following restrictions, in addition to those lawfully imposed by the rules, regulations, and orders of the department, to-wit:

1. All such sales shall be made only in accordance with a printed price list posted conspicuously in a prominent place on the premises and furnished to the purchaser.

2. No beer or intoxicating liquor so sold shall be served over a bar for consumption thereat.

3. No beer or intoxicating liquor so sold shall be served to a person unless he is seated at a table; excepting that beer or intoxicating liquor may be served by a hotel in the room of a bona fide guest thereof.

4. Neither the seller nor the board of liquor control by its regulations, shall require the purchase of food with the purchase of beer or intoxicating liquor; nor shall the seller of beer or intoxicating liquor give away food of any kind in connection with the sale of beer or intoxicating liquor.

5. The seller shall not suffer or permit the purchaser to remove intoxicating liquor so sold from the premises.

SECTION 22. Sales of beer and intoxicating liquor under any and all classes of permits authorized by this act and from state liquor stores shall be subject to the following restrictions, in addition to those lawfully imposed by the rules, regulations, or orders of the department, to-wit:

1. No beer shall be sold to any person unless he shall have attained the age of sixteen years; and no intoxicating liquor shall be sold to or handled by any person unless he shall have attained the age of twenty-one years.

2. No sales shall be made to an intoxicated person.

3. No intoxicating liquor shall be sold to any individual who habitually drinks intoxicating liquor to excess, or to whom the department has, after investigation, determined to prohibit the sale of such intoxicating liquor, because of cause shown by the husband, wife, father, mother, brother, sister, or other person dependent upon, or in charge of such individual, or by the mayor of any municipal corporation, or a township trustee of any township in which the individual resides. The order of the department in such case shall remain in effect until revoked by the department.

4. Excepting under class G permits, no sales of intoxicating liquor shall be made on Sunday or on the day of holding any election.

5. No holder of a permit shall give away any beer or liquor of any kind or description at any time in connection with his business.

SECTION 23. The sale of intoxicating liquor and alcohol under class G permits shall be subject to the following re-

strictions in addition to those lawfully imposed by the rules, regulations, or orders of the department, to-wit:

1. All sales under such permits shall be made by the registered pharmacist in charge of the store or by a registered assistant pharmacist, lawfully employed therein.

2. All sales to hospitals, infirmaries, medical or educational institutions for the uses authorized by such permits shall be made only upon the written, signed, dated, and sworn application of the superintendent of such institution.

3. All sales of alcohol to physicians, dentists and veterinary surgeons shall be made only on the written, signed, dated, and sworn application of such physician, dentist or veterinary surgeon, as the case may be, personally presented by him.

4. All sales of wine for sacramental purposes shall be made only upon the written, signed, dated and sworn application of the clergyman or official purchasing the same. Such application must have endorsed thereon the approval of a general administrative officer, if there be such, of the religious group to which the purchasing clergyman or official belongs. The name, address and official position of such administrative officer, if there be such, shall be certified to the department in such manner as the board may by regulation prescribe.

5. All sales of alcohol for mechanical, chemical or scientific purposes shall be made only upon the written application of the purchaser known by the registered pharmacist or assistant pharmacist to be a person engaged or employed in such mechanical, chemical or scientific pursuits, which application shall be dated, signed, and sworn to by the purchaser thereof.

All applications required by this section shall state clearly and specifically the kind and quantity of intoxicating liquor or alcohol required and the use to which it is to be put by the person purchasing the same, and that he will not use any of the intoxicating liquor or alcohol procured thereon for a beverage or for any other use than that stated in the application.

All prescriptions and applications required by this section shall be cancelled as soon as filled by the person filling the same, by having the word "cancelled" plainly written or stamped thereon and signed and dated by the person who filled the same, and shall be kept open to public inspection. It shall be unlawful to furnish intoxicating liquor or alcohol more than once on any such prescription or application.

Each holder of such a permit shall register in an alphabetically arranged book, kept exclusively for that purpose, all prescriptions of physicians and dentists, in the following order: the name of the physician or dentist; the name of the person prescribed for; the quantity and kind of intoxicating liquors or alcohol; and the use for which prescribed. The person making the sale shall endorse upon the prescription the date upon which it was filled and his own name. Each such holder shall likewise keep a record of applications, showing the date of each, by whom made, the quantity and kind of intoxicating liquor or alcohol supplied and when, where and for what purpose and by whom the same was to be used. Each applicant shall certify to the same by signing his name thereto in such record book. Such book shall be open at all times during business hours to the inspection of the department.

For the purposes of this section, any registered pharmacist or assistant pharmacist shall have authority to administer the oath herein required.

Section 24. It shall be unlawful for any manufacturer or wholesale distributor to aid or assist the holder of any permit for sale at retail by gift or loan of any money or property of any description or other valuable thing, or by giving of premiums or rebates; and it shall be unlawful for the holder of any such permit to accept the same.

No manufacturer or wholesale distributor shall have any financial interest, directly or indirectly, by stock ownership or through interlocking directors in a corporation, or otherwise, in the establishment, maintenance or promotion of the business of any retail dealer; nor shall any manufacturer or wholesale distributor, nor any stockholder thereof acquire, after the date when this act shall take effect, by ownership in fee, leasehold, mortgage or otherwise,

directly or indirectly, in the premises whereon the business of any other person engaged in the business of trafficking in beer or intoxicating liquor is conducted; and all contracts, covenants, conditions and limitations whereby any person engaged or intending or proposing to engage in the sale of beer or intoxicating liquors promises to confine his sales of a particular kind or quality of beer or intoxicating liquor to one or more product or products, or the product or products of a specified manufacturer or wholesale distributor, or to give preference to such product or products, shall to the extent of such promise be absolutely void and of no effect; excepting that the making of such promise in any such form shall be cause for the revocation or suspension of any permit issued to any party thereto.

SECTION 25. The department of liquor control may revoke any permit issued pursuant to this act for violation of any of the applicable restrictions of this act or of any lawful rule or regulation of the board of liquor control or other sufficient cause, and must revoke any such permit for any of the following causes:

1. In case of conviction of the holder or his agent or employee for violating any of the penal provisions of this act or for a felony.

2. For making any false material statement in an application for a permit.

3. For assigning, transferring or pledging a permit contrary to the rules and regulations of the board of liquor control adopted pursuant to this act.

4. For selling or promising to sell beer or intoxicating liquor to a wholesale or retail dealer who is not the holder of a proper permit at the time of the sale or promise.

5. For failure or default of the holder of a permit to pay an excise tax or any part thereof together with any penalties imposed by or under the provisions of the law relating thereto and for violation of any rule or regulation of the tax commission of Ohio in pursuance thereof.

The department shall cancel any permit issued pursuant to this act:

1. When required to do so by the provisions of section 37 of this act.

2. Excepting as otherwise provided in the rules and regulations of the board of liquor control relative to the transfer of permits, in the event of the death or bankruptcy of the holder thereof, the making of an assignment for the benefit of the creditors of the holder thereof, or the appointment of a receiver of the property of such holder.

Any person or his employee or agent who has been determined by a court having jurisdiction, to have violated section 12940 of the General Code of Ohio, or any part thereof, shall forthwith forfeit any permit granted to him. In addition to the board, such court shall have the power to order such forfeiture. Any place granted such permit by the department, shall be deemed a place of public accommodation, within the meaning of said section 12940. Application for another permit shall not be considered by the department under one year from date of said forfeiture.

SECTION 26. The department may act in the revocation or cancellation of any permit on its own initiative or on complaint of any person, after a hearing at which the holder shall be given an opportunity to be heard in such manner and upon such notice as may be prescribed by the rules and regulations of the board of liquor control. The department may suspend any permit pending such hearing and the appeal provided for in this act, but the period of such suspension shall not exceed thirty days.

SECTION 27. Any person deeming himself aggrieved thereby may appeal to the board of liquor control from the action of the department refusing to issue a permit or revoking a permit.

Within three days after a permit shall have been revoked, cancelled or suspended, the department shall give notice to the holder thereof by mail, addressed to him at the premises named in such permit. The holder shall thereupon surrender the permit by mailing it to the commission by

registered mail or insured parcel post. A certified copy of any notice of revocation, cancellation or suspension given by the department shall be forthwith mailed to the chief of police, marshal or other chief police officer of the city or village in which the premises for which the revoked permit was issued are situated, or upon the sheriff of the county or constable of the township, in case the permit was issued for premises situated outside of any municipal corporation, together with a statement of the number of the permit, the name and place of residence of the holder, the location of the premises for which the permit was issued and the date when such permit was suspended, cancelled or revoked, and, in case of suspension, the period thereof, to the extent such facts are not disclosed by the certified copy of the notice of revocation, cancellation or suspension. In case such permit be not forthwith surrendered the department shall issue a written demand for the surrender thereof and deliver the same to the sheriff of the county in which the premises for which the same are issued are located, or to any special agent of the department, and such sheriff or agent shall immediately demand and secure possession thereof and return the same to the department.

If a permit is suspended and not revoked, or if the action of the department, revoking a permit, is reversed by the board of liquor control, the permit in question shall be forthwith returned by the department to the holder thereof; and the department shall at the same time give notice as herein required to the police officer to whom such prior notice has been given, or his successor in office, that such permit has been restored to the holder.

SECTION 28. The revocation or cancellation of any permit shall entail the loss of the privilege conferred thereby and the seizure by the department of any beer, intoxicating liquor or alcohol which it may find on the premises covered by the permit or in the possession of the holder thereof, shall not be a bar to the prosecution of the holder for any offense under this act or the penal laws of this state committed while such permit was in force; nor shall conviction of any such offense prevent the department from seizing

beer, intoxicating liquors or alcohol so found as herein provided.

SECTION 29. All fees collected by the department shall be paid to the treasurer of state as custodian of the undivided liquor permit fund hereby created, at the times prescribed in section 10 of this act. Each payment shall be accompanied by a statement showing separately the amount collected for each class of permits in each municipal corporation and in each township outside the limits of any municipal corporation therein.

The undivided liquor permit fund in the custody of the treasurer of state shall be distributed on order of the auditor of state at quarterly calendar periods as follows:

To each municipal corporation the aggregate amount shown by the statements to have been collected from permits therein, for the use of the general revenue fund of such municipality.

To each township the aggregate amount shown by the statements to have been collected from permits in the territory thereof outside of the limits of any municipal corporation located therein, for the use of the general revenue fund of such township.

For the purpose of the distribution herein required, class E and class H permits and class D permits covering boats or vessels, shall be deemed to have been issued in the municipal corporation or township wherein the owner or operator of the vehicle, boat, vessel or dining car equipment to which same relates, has his or its principal office or place of business within the state of Ohio.

The distributions herein made shall be subject to diminutions for refunds as prescribed in section 39 of this act.

SECTION 30. No court of this state, other than the common pleas court of Franklin county, shall have jurisdiction of any action against the board, the director, or the department, to restrain the exercise of any power or to compel the performance of any duty under this act. Neither the department, nor the members of the board, nor the director shall be personally liable in any action at law for damages sustained by any person because of any acts performed or

done by the department, the board, or the director, or any employee of the department, in the performance of his duties and the administration of this act.

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SECTION 39. Whenever the department of liquor control shall cancel a permit, as required by any provision of this act, the department shall refund to the holder thereof, or to his executors, administrators, receivers, trustees in bankruptcy or to an assignee for the benefit of his creditors, a proportionate amount representing the unexpired portion of his permit year; excepting that such refund shall in no event be more than ninety per cent of such fee, and if the unexpired portion of the license year be less than thirty days no refund shall be made. Such refund shall be made from the moneys in the custody of the treasurer of state and subject to the order of the department; and at the next distribution of permit fee revenues, the amount so refunded shall be withheld from the moneys, if any, due to the subdivision which received the original permit fee.

SECTION 40. Whenever, upon the revocaton or cancellation of a permit, the department of liquor control seizes beer, intoxicating liquor or alcohol, or any of them, pursuant to any provision of this act, the department shall:

1. Pay to the holder of such permit, or to his executors, administrators, trustees in bankruptcy, receivers, or assignees for the benefit of his creditors, for all such seized beer or intoxicating liquor which shall have been purchased from the department and which remains in packages sealed by the department, the amount originally received by the department from such holder, less ten per centum thereof.

2. Forthwith destroy any beer, intoxicating liquor or alcohol so seized which shall have been illegally acquired by the holder, which such beer, intoxicating liquor or alcohol is hereby declared to be a public nuisance; and no payment shall be made therefor.

3. At such time as may be convenient, sell, either at public or private sale as the department may in its discretion

determine, and to one or more holders of proper permits, any beer, intoxicating liquor or alcohol so seized, which shall have been lawfully acquired by the holder otherwise than from the department. From the proceeds of such sale there shall first be deducted in the order named, the cost and expense of making such sale, the expense of keeping the property sold, the amount of any excise taxes and penalties which may be due from such holder to the state, the amount of all liens, according to their priorities, which shall have been established in any proceeding brought for that purpose, and an amount equal to ten per centum of the gross proceeds of such sale; and the balance, if any, shall be paid by the department to the holder, or to such executors, administrators, trustees in bankruptcy, receivers, or assignees for the benefit of his creditors.

In case of any seizure of beer, intoxicating liquor or alcohol under execution of any judgment rendered against the holder of a permit or in case of the foreclosure of any lien on any beer, intoxicating liquor or alcohol belonging to any such holder, or in the case of the insolvency or bankruptcy of such holder, or in any other case in which judicial process is employed to subject any beer, intoxicating liquor or alcohol belonging to or in the possession of the holder of a permit issued under authority of this act to any claims whatsoever, the officer seizing such beer, intoxicating liquor or alcohol or taking possession thereof pursuant to such process, shall deliver to the department all beer, intoxicating liquor or alcohol found in the possession of the judgment debtor, bankrupt or person for whom he shall have been appointed as a receiver as the case may be; and thereupon the commission shall proceed in the manner required and authorized by this section as if such beer, intoxicating liquor or alcohol had been seized in the first instance by the department, and pay the balance of the proceeds of the sale thereof to the officer holding the process, to be disposed of by him according to law and the orders of the court issuing the same.

Section 41. For the purpose of providing revenues for the support of the state, a tax is hereby levied on the sale

or distribution in Ohio of wine, excepting for known sacramental purposes, at the rate of ten per centum of the retail selling price thereof. Only one sale of the same article shall be used in computing the amount of tax due hereunder. For the purposes of this section and of sections 42 to 49, both inclusive, of this act, the term "retail selling price" means the ordinary, customary, or usual price paid by the consumer and the words "sale" and "sell" include exchange, barter, gift, offer for sale and distribution.

SECTION 42. The tax hereby imposed shall be paid by the purchase of stamps. Such stamps shall be designed or procured and sold, purchased, affixed to each bottle or other container, and cancelled in the manner and at the time provided in sections 6212-49c to 6212-49g, both inclusive, of the General Code, relating to the tax imposed upon the sale of bottled beverages; excepting that the commission may by regulation provide that the denominations of such stamps shall represent the retail selling price of the wine, the sale of which is taxed thereby, instead of the amount of the tax thereon. The commission, the treasurer of state, the auditor of state, and county treasurers shall have and exercise with respect to the administration of the tax imposed by this act, all the powers and duties vested in or imposed upon said commission and other officers named herein by the provisions of said sections of the General Code: and manufacturers and bottlers of, and wholesale and retail dealers in wine, and railroad companies, express companies and other public carriers transporting shipments of wine shall be subject to, with respect to the tax hereby imposed, the same duties, and entitled to the same privileges as are provided by any of said named sections of the General Code. The treasurer of state shall pay for redeemed stamps issued pursuant to this act and shall make refunds pursuant to this act from an appropriation to him for the purpose of defraying the expenses of administering this act.

In addition to the refunds authorized by the sections of the General Code mentioned in this section, under the circumstances therein named, the holder of a class G permit

and/or permit B-3 shall be entitled to a refund of the actual amount of tax paid on sales of wine for sacramental purposes, upon condition that he make affidavit that such wine was so sold, and furnishes from the purchaser a written acknowledgment that he has received such wine, and that the price paid therefor does not include the amount of the tax, together with a statement showing the face value of the stamps on the containers of wine so received, and the name and address of the purchaser. Such affidavit and acknowledgment and statement shall be filed with the treasurer of state, who shall make such refund in the manner provided in section 6212-49h of the General Code and authorized by this section.

SECTION 43. For the purpose of providing revenue for the support of the state, a tax is hereby levied on the excess gross profits derived from the manufacture or sale of spirituous liquor under permits authorized by this act, at the rate of twenty-five per centum of such excess gross profits, computed as required by this section and the rules and regulations of the commission adopted pursuant to the authority hereby conferred. For the purpose of this section the term "excess gross profits" means the amount by which, during the period covered by the return required under authority hereof, the gross receipts derived from all sales of spirituous liquor, except sales by a manufacturer for consumption outside of this state, exceed twice the sum of the following, to-wit:

1. In the case of a manufacturer, the cost of all materials and supplies purchased prior to or during the period and used or consumed in the manufacture of the spirituous liquor sold during the period, including all taxes paid or accrued on such spirituous liquor; and in the case of a retailer, the cost of the spirituous liquor purchased prior to or during the period and sold during the period.

2. In the case of any taxpayer, the amount actually expended for labor and other personal services, excluding salaries of executive officers, employed in or in connection with the manufacture or sale of spirituous liquor sold during the period.

Each holder of a permit authorizing the manufacture or sale of spirituous liquor, or his executor, administrator, trustee in bankruptcy, receiver or assignee for the benefit of creditors, shall, on or before the tenth day of each calendar month make return to the commission in such form as the commission may by rules and regulations prescribe, showing the basis on which the tax imposed by this section is due for the preceding calendar month or the part thereof during which the permit was in force, and such further information as the commission may require. An authorized assignee or transferee of a permit assigned or transferred during a calendar month shall make return for the entire calendar month. Upon receiving any return the commission shall determine and assess the amount of the excess gross profits derived under the permit, as herein defined, for the preceding calendar month or part thereof and on or before the fifteenth day of each calendar month shall transmit to the auditor of state a duplicate statement in such form as the auditor of state shall prescribe, showing the name of each permit holder, executor, administrator, trustee in bankruptcy, receiver, or assignee for the benefit of creditors subject to the tax hereby imposed and the amount of the excess gross profits of each for the preceding calendar month, together with such other information as the auditor of state may deem necessary. On receipt of such duplicate statement the auditor of state shall compute the tax due from each permit holder or other person herein named, at the rate prescribed by this section, and on or before the twentieth day of each calendar month shall transmit to the treasurer of state a copy of such statement, showing the amount due from each. On or before the twentieth day of each calendar month each permit holder or other person herein named shall pay to the treasurer of state the tax due in respect of excess gross profits during the preceding calendar month, together with any taxes or penalties, or both, on account of amounts omitted in or for any prior calendar month as certified to the treasurer of state during such preceding calendar month. Such payment shall be accompanied by a copy of the statement filed with the commission. Such determination, computation and

payment shall be tentative and provisional only and without prejudice to the power of the commission, hereby conferred, to audit each return and to certify, in any calendar month subsequent to the one for which return and provisional payment have been made, a final corrected determination of excess gross profits for such month, in the form of an additional amount, or a deduction from the amount for the month in which such final determination is made, as the case may require; and the commission shall have power at any time to make a final determination for any calendar month or part thereof for which no return has been made as herein required. Prior to the certification of any such final determination, the commission shall notify the permit holder or any other person affected thereby as to the amount thereof and in such notice fix a time and place at which such permit holder or other person may be heard as to the correctness of such final determination. A penalty of fifteen per centum of the amount of the tax shall be assessed by the auditor of state for failure to pay the tax at the time required by law; and a penalty of fifteen per centum of the amount of the tax shall be assessed by the commission for failure to file a return as required by law and the rules and regulations of the commission. A penalty of twenty-five per centum of the amount of the tax shall be assessed by the commission for the filing of a false or fraudulent return. Such taxes and penalties may be recovered in the manner provided by section 6212-60 of the General Code.

SECTION 44. Moneys received into the state treasury from the taxes levied, penalties assessed and sums recovered under the provisions of this act shall be credited to the general revenue fund therein.

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SECTION 51. Whenever the commission or any of its deputies or employees authorized by it for such purpose shall discover any wine, subject to tax as provided by this act, and upon which the tax has not been paid as herein required, the commission, or such deputy or employee is hereby authorized and empowered forthwith to seize and

take possession of such wine, which shall thereupon be deemed to be forfeited to the state and the commission may within a reasonable time thereafter by a notice posted upon the premises where such seizure is made, or by publication in some newspaper having circulation in the county wherein such seizure is made, at least five days before the day of sale, sell such forfeited wine, and from the proceeds of such sale shall collect the tax due thereon together with a penalty of fifty per centum thereof and the costs incurred in such proceedings and pay the balance, if any, to the person in whose possession such forfeited wine was found; provided, however, that such seizure and sale shall not be deemed to relieve any person from fine or imprisonment provided herein for violation of any provision of this act. Such sale shall be made in the county where most convenient and economical. All moneys collected under the provisions of this section shall be paid into the state treasury to the credit of the general revenue fund.

SECTION 52. The department of liquor control shall on the first day of each month certify to the tax commission of Ohio a list of the names and addresses of all holders of permits issued by it during the preceding month and then in force, together with a list of eliminations from any prior list. The taxation provisions of this act shall be deemed to be one of the laws which the tax commission of Ohio is required to administer within the meaning of sections 1465-9, 1465-12 to 1465-30, inclusive, 1465-32 and 1465-34 of the General Code.

SECTION 53. In the interpretation of the provisions of the General Code of Ohio, other than this act, the word "liquor" and the phrase "intoxicating liquor" shall be construed to have the meaning assigned to the phrase "intoxicating liquor" by section 1 of this act.

As used in the succeeding sections of this act and in the interpretation of the provisions of the General Code of Ohio relating to intoxicating liquor, other than this act:

"Sale" and "sell" include exchange, barter, gift, offer for sale, distribution and delivery of any kind.

"Vehicle" includes all means of transportation by land, by water, or by air, and everything made use of in any way whatsoever for such transportation.

SECTION 54. Whoever, not being the holder of a class A permit issued by the department of liquor control, in force at the time, and authorizing the manufacture thereof, or an agent or employee of the department of liquor control authorized by law and by said department to manufacture such beer or intoxicating liquor, either directly or indirectly, himself or by his clerk, agent, or employee, manufactures any beer or intoxicating liquor for sale; or

Whoever, not being the holder of a class B, class C, class D, class E, class F, or class G permit issued by the department of liquor control, in force at the time, and authorizing the sale thereof, or an agent or employee of the department of liquor control or the tax commission of Ohio authorized by law and by said department or commission to sell such beer or intoxicating liquor, either directly or indirectly, himself or by his clerk, agent, or employee, sells, keeps or has in possession for sale any beer or intoxicating liquor, or sells any alcohol at retail, shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined not less than one hundred dollars nor more than one thousand dollars, or be imprisoned not less than thirty days nor more than six months, or both. Whoever, being the holder of a permit issued by the department of liquor control, either directly or indirectly, himself or by his clerk, agent or employee, sells, keeps or has in his possession for sale any intoxicating liquor not purchased from the department of liquor control or from the holder of a permit issued by the department of liquor control authorizing the sale of such intoxicating liquor unless the same has been purchased with the special consent of the department shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined not less than one hundred dollars nor more than one thousand dollars, and be imprisoned not less than thirty days nor more than six months. The department of liquor control shall revoke the permit of any person convicted of this offense.

SECTION 55. Whoever, not being the holder of a class H permit, transports or imports beer, intoxicating liquor or alcohol, or any of them, in this state, shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined not less than one hundred dollars nor more than one thousand dollars, or be imprisoned not less than thirty days nor more than six months, or both. This section shall not apply to the transportation and delivery of beer or intoxicating liquor purchased or to be purchased from the holder of a permit issued by the department of liquor control, in force at the time, and authorizing the sale and delivery of the beer or intoxicating liquor so transported, nor of beer, intoxicating liquor or alcohol purchased from the department of liquor control or the tax commission of Ohio.

SECTION 56. Whoever falsely or fraudulently makes, forges, alters or counterfeits any wrapper, label, cork or cap prescribed by the board of liquor control under the provisions of this act, or causes or procures to be falsely or fraudulently made, forged, altered or counterfeited any such wrapper, label, cork or cap, or knowingly and wilfully utters, publishes, passes or tenders as true, any such false, altered, forged or counterfeited wrapper, label, cork or cap, or uses more than once any wrapper, label, cork or cap prescribed by the board of liquor control pursuant to this act, shall be deemed guilty of a felony and on conviction thereof shall be imprisoned in the penitentiary for a term of not less than one year nor more than ten years.

SECTION 57. Whoever has in his possession an opened bottle, flask, or container, containing intoxicating liquor, in a state liquor store or on the premises of the holder of a permit issued by the department of liquor control authorizing the sale of such intoxicating liquor, unless such intoxicating liquor shall have been lawfully purchased for consumption on such premises, shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined not less than ten dollars nor more than fifty dollars.

SECTION 58. Whoever consumes any intoxicating liquor in a motor vehicle, shall be deemed guilty of a misdemeanor

and upon conviction thereof shall be fined not less than twenty-five dollars nor more than two hundred dollars, or imprisoned not less than ten days nor more than three months, or both.

SECTION 59. Money arising from fines and forfeited bonds collected under any of the penal laws of this state relating to the manufacture, importation, transportation, distribution or sale of beer or intoxicating liquor shall be paid one-half into the state treasury to the credit of the general revenue fund therein and one-half into the treasury of the county where the prosecution is held.

* * * * * * *

SECTION 61. The judge of a court of record may issue warrants to search a house, building, place, vehicle, watercraft, aircraft or conveyance for beer, alcohol or intoxicating liquor manufactured, possessed, stored, concealed, sold, furnished, given away, or transported in violation of any provision of this act and the containers in which the same may be found, or machinery, tools, implements, equipment, supplies and materials used or kept for use in manufacturing beer or intoxicating liquor in violation of any provision of this act, and to seize any of such property and things found therein, together with the vehicle, watercraft, aircraft, or conveyance in which the same may be found. The issuance of such warrants shall be subject in all respects to the provisions of sections 13430-2 to 13430-7, both inclusive, of the General Code; excepting that any such vehicle, watercraft, aircraft, or other conveyance shall be returned to the owner thereof upon execution by him of a bond with surety to the satisfaction of the officer making the seizure in an equal amount to the value thereof, conditioned upon the return thereof to the custody of such officer on the day of trial to abide by the judgment of the court. Upon conviction of any violation of any provision of the liquor control act, any property or thing found in the possession of the person convicted or his agent or employee shall be disposed of as provided in section 6212-43 of the General Code. If the accused is discharged by the judge or magistrate, such ve-

hicle, watercraft, aircraft, or other conveyance shall be returned to the owner thereof and any bond which may have been given pursuant to the provisions of this section shall be cancelled; if the accused is the holder of a permit issued under authority of the liquor control act, any beer, intoxicating liquor or alcohol so seized shall be delivered to the department of liquor control and disposed of as provided in section 40 of this act and any other property so seized shall be returned to the owner thereof by the officer having the same in possession or custody; if the accused is not the holder of such a permit in force at the time, any beer, intoxicating liquor or alcohol and other property, excepting as herein provided, shall be forthwith destroyed and any such beer, intoxicating liquor or alcohol or other property is hereby declared to be a public nuisance.

* * * * * * *

Sec. 6212-43. When * * * *any agent or employee of the department of liquor control deputized for that purpose,* or any *other* officer of the law, shall discover any person in the act of transporting in violation of law, *beer or* intoxicating liquors in any wagon, buggy, automobile, water or air craft, or other vehicle, it shall be his duty to seize any and all *beer or* intoxicating liquors found therein being transported contrary to law. Whenever *beer or* intoxicating liquors transported or possessed illegally shall be seized by an officer named herein, he shall take possession of the vehicle and team, or automobile, boat, air or water craft, or any other conveyance, and shall arrest any person in charge thereof. Such officer shall at once proceed against the person arrested under the * * * *liquor control act*, in any court having jurisdiction *of offenses* under * * * *said act*, but the said vehicle or conveyance shall be returned to the owner upon execution by him of a good and valid bond with sufficient sureties, in a sum equal to the value of the property, which said bond shall be approved by said officer and shall be conditioned to return said property to the custody of said officer on the day of trial to abide by the judgment of the court. The court upon conviction of the person so arrested shall order the *beer or intoxicating*

liquor destroyed, and unless good cause to the contrary is shown by the owner, shall order a sale * * * *at* public auction of the property seized, and the officer making the sale, after deducting the expenses of keeping the property, the fee for the seizure and the cost of the sale, shall pay all liens, according to their priorities, which are established, by intervention or otherwise at said hearing or in other proceeding brought for said purpose, as being bona fide and as having been created without the lienor having any notice that the carrying vehicle was being used or was to be used for illegal transportation of *beer or intoxicating* liquor, and shall distribute the balance as is distributed money arising from fines and forfeited bonds under the * * * *liquor control act.*

All liens against property sold under the provisions of this section shall be transferred from the property to the proceeds of the sale of the property. If, however, no one shall be found claiming the team, vehicle, water or air craft, automobile, or other conveyance, the taking of the same, with a description thereof, shall be advertised in some newspaper published in the city or county where taken, or if there is no newspaper published in such city or county, in a newspaper having circulation in the county, once a week for four weeks and by hand bills posted in three public places near the place of seizure, and if no claimant shall appear within ten days after the last publication of the advertisement, the property shall be sold and the proceeds after deducting the expense and costs shall be distributed as hereinbefore provided in case there was a claimant for the said vehicle or conveyance.

Sec. 6212-49a. As used in sections 6212-49a to 6213-49t, both inclusive, of the General Code:

"Beverages" includes beer as defined by section 6212-63 of the General Code *as amended* and also all beverages whatsoever excepting milk and cream and proprietary medicines; *and excepting also all intoxicating liquor.*

"Commission" means the tax commission of Ohio.

"Person" includes firms and corporations.

"Wholesale dealer" includes only those persons who sell bottled beverages to retail dealers or for purposes of resale only.

"Retail dealer" includes every person other than a wholesale dealer or a manufacturer engaged in the business of selling bottled beverages in this state, irrespective of quantity or amount or number of sales thereof.

"Sales" includes exchange, barter, gift, offer for sale and distribution, and excludes transactions in interstate or foreign commerce.

Sec. 6212-50. It shall be the duty of every class A and class B permit holder, and such class C and class D permit holders as may have sold or distributed beer on which the tax levied by the provisions of section * * * 6212-49 *of the General Code* has not been paid, *or their executors, administrators, trustees in bankruptcy, receivers or assignees for the benefit of creditors,* on or before the tenth day of the calendar month, to transmit to the tax commission of Ohio, upon a form prescribed and furnished by the tax commission of Ohio, a return, under oath or affirmation, showing the amount of beer sold or distributed by such permit holder in Ohio on which the tax is due for the preceding calendar month. Such return shall show such further information as the tax commission of Ohio may require. The tax commission of Ohio may adopt and/or modify rules and regulations with reference to the manner of payment of the tax and fees to be paid and the documents required to certificate payment thereof.

No beer manufactured, sold or distributed in Ohio shall be taxed more than once under the provision of section * * * 6212-49 *of the General Code.*

Sec. 6212-53. The taxes * * * imposed by * * * *section* 6212-49 *of the General Code and the permit fees and excess gross profits taxes imposed by the liquor control act* shall be a line upon all of the property of the taxpayer or permit holder. If the surety on any bond required under the provisions of any section of this liquor control act make payment of any sums due under any bond given hereunder, the surety shall be subrogated to any lien right herein provided on any and all property of the taxpayer or permit holder.

Sec. 6212-58. On or before the fifteenth day of each calendar month, the tax commission of Ohio shall transmit to the auditor of state a statement showing:

1. The names of all permit holders *or other persons on their behalf* who have filed a report provided for in section * * * 6212-50 *of the General Code,* during the same calendar month.

2. The amount of tax due under the provisions of section * * * 6212-49 *of the General Code* as shown by the reports of such permit holders *or other persons.*

3. The names of any permit holders *or other persons on their behalf* whom the tax commission determines by investigation to have improperly reported the quantity of beer sold or distributed during any preceding calendar month together with the quantity of such beer found by the tax commission to have been omitted.

4. Such other information as the auditor of state may deem necessary.

Upon receipt of such statement from the tax commission, the auditor of state shall compute the tax due from each permit holder *or other person* at the rate as prescribed by law. On or before the 20th day of each calendar month, the auditor of state shall transmit to the treasurer of state a copy of such statement, showing the amount due from each permit holder *or other person.* On or before the 20th day of each calendar month, each permit holder *or other person in whose name the tax has been assessed* shall pay to the treasurer of state * * * the tax due on the sale or distribution of beer by him during the preceding calendar month, together with any amounts omitted and any tax penalty on the amounts omitted, as certified to him during such calendar month. Such payment shall be accompanied by a copy of the statement filed with the tax commission.

The * * * revenue derived from the tax on the sale and distribution of beer pursuant to the provisions of section * * * 6212-49 *of the General Code* shall be for the use of the general revenue fund of the state. * * *

Sec. 6212-63. For the purposes of * * * *sections* 6212-44 to 6212-49, *both inclusive, of the General Code, sections* 6212-49a to 6212-49t, *both inclusive, of the General Code, sections* 6212-50 *to* 6212-54, *both inclusive, of the General Code, section* 6212-54a *of the General Code, sections* 6212-55 *to* 6212-62, *both inclusive, of the General Code and section* 6212-64 *of the General Code,* the term "beer" as used in * * * *any of said sections* shall include beer, lager beer, ale, stout and porter, ale, and other brewed or fermented beverages containing one half of one per centum or more of alcohol by * * * *weight* but not more than 3.2 per centum of alcohol by weight.

Sec. 6212-64. Any person, firm, or corporation, or his or its employee or agent, who * * * manufactures for sale, distributes or sells * * * any beverage upon which the tax provided for by * * * *section* 6212-49 *of the General Code* has not been paid, shall be deemed guilty of a misdemeanor and upon conviction shall forfeit any permit granted to him, or it, by the commission and shall be fined not less than one hundred ($100.00) dollars nor more than one thousand ($1,000.00) dollars or be imprisoned not less than thirty (30) days nor more than six (6) months, or both.

* * * * * * *

Section 65. There is hereby appropriated from the moneys in the treasury of state to the credit of the general revenue fund, to the department of liquor control the sum of $50,000 for personal service and the sum of $250,000 for supplies and maintenance; to the auditor of state the sum of $10,000 for personal service and the sum of $5,000 for supplies and maintenance; to the treasurer of state the sum of $19,000 for personal service, the sum of $5,000 for supplies and maintenance and the sum of $10,000 for the purpose of making refunds; to the attorney general, the sum of $7,500 for personal service and the sum of $2,500 for traveling expense; to the department of finance, division of tax commission of Ohio, the sum of $30,000 for personal service and the sum of $30,000 for supplies and maintenance; to pay liabilities lawfully incurred in the adminis-

tration of the provisions of this act during the period commencing with the effective date hereof and ending on the 31st day of March, 1935. The appropriations herein made from the general revenue fund to the department of liquor control shall be reimbursed from the moneys in the custody of the treasurer of state for the use of the department, in the manner provided in section 10 of this act at the earliest possible date as determined by the department of liquor control and the department of finance, as therein provided.

SECTION 66. Any and all compensation provided for by the provisions of this act or by designation of the director in such salaries or other compensation as he shall fix, shall be subject to the terms of Senate Bill No. 5, enacted by the 89th General Assembly in special session, September 30th, 1932 and approved by the governor October 3, 1932.

SECTION 67. The sections and parts of sections included in this act are hereby declared to be independent sections and parts of sections; if any such section or part of section shall be held invalid, such holding shall not affect the remainder of this act, nor the context in which such part of section so held invalid may appear, excepting to the extent that an entire section or part of section may be inseparably connected in meaning and effect with the section or part of section to which such holding shall directly apply. The intention and purpose of this act extends to the control and regulation of the traffic in intoxicating liquor in this state to the full extent permitted by the constitutions of this state and of the United States.

SECTION 68. This act is hereby declared to be an emergency measure necessary for the immediate preservation of the public peace, health and safety. The reasons for such necessity are that the repeal of article XV, section 9 of the constitution of this state and the adoption of the twenty-first amendment of the constitution of the United States, whereby the eighteenth amendment of the constitution of the United States has been repealed, have made manifest a strongly prevailing sentiment in this state opposed to the policy of prohibition of the traffic in intoxi-

cating liquors and in favor of the policy of regulation as embodied in this act; and that the statutes of this state, relating to the traffic in intoxicating liquors are so far predicated upon said repealed provisions of the constitution of this state and that of the United States, and the acts of the congress of the United States under authority of said repealed provision of the constitution of the United States, that substantial doubt exists as to their scope and effect, by reason of said repeals; and there is in the opinion of the general assembly strong reason to believe that said existing statutes of this state do not have the support of a preponderant public opinion; so that the general assembly is convinced that unless the doubt and confusion which now exists concerning the state of the law of this state relative to the traffic in intoxicating liquors be immediately dispelled and a system of control of such traffic consistent with the strongly prevailing sentiment of the people as evidenced by their action, herein mentioned, be immediately put into effect, conditions seriously affecting the public peace, health and safety will prevail. Therefore this act, excepting as herein specifically provided, shall go into immediate effect.

FRANK CAVE,
Speaker of the House of Representatives.
CHARLES SAWYER,
President of the Senate.

Passed December 22, 1933.
Approved December 23, 1933.

GEORGE WHITE,
Governor.

Filed in the office of the Secretary of State at Columbus, Ohio, on the 23rd day of December, A. D. 1933.

I hereby certify that the foregoing is a true copy of the engrossed bill.

GEORGE S. MYERS,
Secretary of State.

FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1933

No. .... Original.

THE STATE OF OHIO,
Complainant,

vs.

GUY T. HELVERING, AS AN INDIVIDUAL AND AS COMMISSIONER OF INTERNAL REVENUE, AND THOMAS J. CONNOR, CARL E. MOORE, HARRY F. BUSEY, AND CHARLES H. GRAVES, AS INDIVIDUALS AND AS UNITED STATES COLLECTORS OF INTERNAL REVENUE IN THE STATE OF OHIO,
Defendants.

SUPPLEMENTARY BRIEF IN SUPPORT OF MOTION FOR LEAVE TO FILE BILL OF COMPLAINT.

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Defendants.

SUPPLEMENTARY BRIEF IN SUPPORT OF MOTION FOR LEAVE TO FILE BILL OF COMPLAINT.

PRELIMINARY STATEMENT.

This court having ordered a rule to issue on the question of granting leave to file bill of complaint in the above

entitled case, directing the defendants to show cause why leave should not be granted, the state of Ohio, by its attorney general, respectfully submits this, the state's supplementary brief, in order that there might be before the court certain points upon which complainant relies in seeking to invoke the original jurisdiction of this court, and which are inextricably interwoven with and necessary to a full consideration of complainant's said motion.

Pursuant to the ratification by the states of the twenty-first amendment to the Constitution of the United States, the state of Ohio found it necessary, in the exercise of its police power and to prohibit the return of the private liquor dealer, the return of the saloon, and to promote temperance, to establish a new department of the state government, known as the department of liquor control, by the enactment of a law, being House Bill No. 1, set forth in Appendix A of complainant's bill of complaint heretofore lodged with the clerk, which should be here summarized:

The General Assembly of Ohio in the enactment of House Bill No. 1 stated in the title of the act that it was the purpose of the Legislature to provide a system for the control of the manufacture, sale and distribution of beer and intoxicating liquor in this state, including a state monopoly for the manufacture, distribution and sale of spirituous liquor, which in the act is defined to include any and all intoxicating liquors which contain more than seventeen per centum of alcohol by volume.

To accomplish the purpose set forth in the title of the

act, the Legislature created a department of liquor control which consists of a board of liquor control of four members and a director of the department. The members of the board of liquor control and the director are appointed by the governor with the advice and consent of the senate of the state of Ohio. (Section 2.)

The principal duties and powers of the board of liquor control are to formulate the policies of the department and to act as a board of review in respect to the rejection, suspension and revocation of permits ordered by the director of the department of liquor control. (Section 3.)

The members of the board of liquor control and the director of the department are required to devote their entire time to the duties of their office and are not permitted to have any financial interest in the manufacture, distribution or sale of beer or intoxicating liquors. (Section 5.)

Each member of the board of liquor control and the director of the department of liquor control is required to give bond to the state and to take an oath of office before entering upon the duties of his office. (Section 6.)

The salaries to be received by the members of the board of liquor control and the director are fixed by the Legislature. (Section 5.)

The director of liquor control is the executive secretary of the board of liquor control and is also empowered to exercise all the powers and duties vested in or imposed upon the department of liquor control, except those vested in the board of liquor control. (Section 7.)

The department of liquor control is authorized to employ, subject to the civil service laws of the state of Ohio, such employes as are necessary to perform and to carry out the functions of the department of liquor control. The department of liquor control is required to establish, manage and control a system of state owned liquor stores for the sale of spirituous liquor by the package or container at retail and to holders of permits issued by the department of liquor control who are authorized to sell spirituous liquor by the drink for consumption on the premises where sold. The state in the establishment and maintenance of such state owned liquor stores, has retained a state monopoly in respect to the manufacture, sale and distribution of spirituous liquor by the package or container. (Section 8.)

The department of liquor control is required to establish at least one state owned liquor store in each county of the state. (Section 11.)

No one but the department is permitted to sell spirituous liquor by the package or container either at wholesale or retail for consumption off the premises, except druggists who are licensed by permit to sell spirituous liquor and alcohol on the prescription of physicians.

All moneys received from the sale of spirituous liquor are paid to the treasurer of the state. (Section 9.)

All persons authorized to dispense spirituous liquor by the drink for consumption on the premises where sold must purchase such spirituous liquor from the state. (Section 19.)

It is a criminal offense for a person, authorized by the

department of liquor control to dispense spirituous liquor by the drink for consumption on the premises where sold, to dispense or to have in his possession for sale spirituous liquor which is not purchased from the department of liquor control. (Section 54.)

Section 30 of the act provides that neither the department, the members of the board nor the director shall be personally liable in any action at law for damages sustained by any person because of any acts performed or done by the department, the board, the director or any employe of the department in the performance of his duties and in the administration of the act.

The attempt of the defendants to assess and collect a tax against the state of Ohio in the exercise of this governmental function, as set forth in said bill of complaint, has created such extraordinary and exceptional circumstances as to leave the state without adequate remedy except by invoking the original jurisdiction of this court in equity.

ARGUMENT.

SUMMARY OF ARGUMENT.

Point I.

The instant case is one in which the state of Ohio has the legal right to invoke the original jurisdiction of this court in injunction.

A. This is an action arising from extraordinary and exceptional circumstances.

Point II.

Defendants have no authority to assess and collect a tax against the means by which the state performs its governmental functions, and hence this is not an action against the United States.

A. In the operation of complainant's department of liquor control, the state is performing a purely governmental function.

B. The federal statutes do not levy a tax against a state which sells and distributes intoxicating liquor.

C. It follows that this is not an action against the United States.

Point III.

The consequences of defendants' attempt to assess and collect a tax against the state, to the operations of the state government.

Point IV.

The case of South Carolina v. United States (199 U. S., 437) is not inconsistent with complainant's position.

POINT I.

THE INSTANT CASE IS ONE IN WHICH THE STATE OF OHIO HAS THE LEGAL RIGHT TO INVOKE THE ORIGINAL JURISDICTION OF THIS COURT IN INJUNCTION.

The right of a state to institute an original action against a citizen or citizens of another state in this court is granted in Article III, Section 2, of the Constitution of the United States.

The right of a state to prosecute a suit in injunction has been recognized by this court.

> **State of Georgia v. Tennessee Copper Co.**, 206 U. S., 230, 51 L. Ed., 1038;
> **State of Florida v. Mellon**, 273 U. S., 12, 71 L. Ed., 511.

A. This is an Action Arising From Extraordinary and Exceptional Circumstances.

There is no question but that ordinarily injunction will not lie to restrain the collection of a federal tax. As stated by Mr. Justice Brewer in the case of **Pacific Whaling Co. v. United States**, 187 U. S., 447, 452 (47 L. Ed., 253):

> "Indeed, in respect to internal revenue taxes, Section 3224, R. S., specifically provides: 'No suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court.' **Something more than mere illegality is necessary to**

justify the interference of a court of equity." (Boldface ours.)

In the case of **Regal Drug Corporation v. Wardell**, 260 U. S., 386, 67 L. Ed., 318, the court had before it an action in which the remedy sought was "by injunction against the collector of internal revenue to restrain him from taking or continuing in possession of its store and its property, or from conducting any action or proceeding to enforce the collection of taxes, assessments or penalties." In that case, the question was as to the validity of a tax levied on the plaintiff's wines, which assessment the plaintiff contended was a fine or penalty rather than additional tax. The Circuit Court of Appeals dismissed the case on the ground that R. S. Section 3224 (Comp. Stat., Section 5947) forbade the prosecution of the injunction, yet this court held that the Circuit Court of Appeals erred in so doing.

If an Individual May Enjoin the Collection of a Federal Tax in the District Court Under Certain Circumstances, a State May Enjoin Such Collection Under Like Circumstances in This Court.

The case of **Hill v. Wallace**, 259 U. S., 44, 66 L. Ed., 822, is authority for the contention that under exceptional and extraordinary circumstances, where a multiplicity of suits would otherwise result, equity may be invoked to restrain the attempted collection of an unauthorized federal tax. It is pertinent to note that that action in injunction was instituted against the secretary of agri-

culture, the commissioner of internal revenue, et al., in the United States District Court, the complainant being an individual citizen, as distinguished from the instant case, where the complainant is one of the states of the United States.

Following Hill v. Wallace, supra, and to the same effect, is the more recent case of **Miller v. Standard Nut Margerine Co.**, 284 U. S., 498, 76 L. Ed., 422, in which an individual instituted an action in the District Court of the United States for the Southern District of Florida to enjoin the collection of a federal oleomargerine tax. The language of this court at pages 509 and 510 is as follows:

> "Independently of, and in cases arising prior to, the enactment of the provision (Act of March 2, 1867, 14 Stat. at L. 475, Chap. 169) which became Rev. Stat. § 3224, this court in harmony with the rule generally followed in courts of equity held that a suit will not lie to restrain the collection of a tax upon the sole ground of its illegality. The principal reason is that, as courts are without authority to apportion or equalize taxes or to make assessments, such suits would enable those liable for taxes in some amount to delay payment or possibly to escape their lawful burden and so to interfere with and thwart the collection of revenues for the support of the government. And this court likewise recognizes the rule that, in cases where complainant shows that in addition to the illegality of an exaction in the guise of a tax there exist special and extraordinary circumstances sufficient to bring the case within some acknowledged head of equity jurisprudence, a suit may be maintained to enjoin the collector. Dows v. Chicago, 11 Wall., 108; Hannewinkle v. Georgetown, 15 Wall., 547; State R. Tax Cases, 92 U. S., 575, 614.

Section 3224 is declaratory of the principle first mentioned and is to be construed as near as may be in harmony with it and the reasons upon which it rests. Cumberland Teleph. & Teleg. Co. v. Kelly, 160 Fed., 316, 321; Baker v. Baker, 13 Cal., 87, 95; Bradley v. People, 8 Colo., 599, 604, 9 Pac., 783; 2 Lewis' Sutherland, Stat. Constr., 2d Ed., § 454. The section does not refer specifically to the rule applicable to cases involving exceptional circumstances. The general words employed are not sufficient, and it would require specific language undoubtedly disclosing that purpose, to warrant the inference that Congress intended to abrogate that salutary and well established rule. This court has given effect to § 3224 in a number of cases. Snyder v. Marks, 109 U. S., 189, 191; Dodge v. Osborn, 240 U. S., 118, 121; Dodge v. Brady, 240 U. S., 122. It has never held the rule to be absolute, but has repeatedly indicated that extraordinary and exceptional circumstances render its provisions inapplicable. Hill v. Wallace, 259 U. S., 44, 62; Dodge v. Osborn, supra; Dodge v. Brady, supra. Cf. Graham v. DuPont, 262 U. S., 234, 257; Brushaber v. Union P. R. Co., 240 U. S., 1.

This is not a case in which the injunction is sought upon the mere ground of illegality because of error in the amount of the tax. The article is not covered by the act." '

It is submitted that if under extraordinary and exceptional circumstances an individual may institute an action to enjoin the collection of a federal tax in a District Court, then by virtue of Article III, Section 2 of the Constitution of the United States, one of the sovereign states may institute such an action under similar circumstances in this court. In addition, judicial relief may be granted

to a state under circumstances which would not justify relief if the suit were between private parties.

Georgia v. Tennessee Copper Co., 206 U. S., 230, 51 L. Ed., 1038.

The extraordinary and exceptional circumstances surrounding the instant case are set forth in the bill of complaint in Paragraph 11, appearing on pages 12 and 13, and need not be reiterated here. In addition to these allegations contained in the bill, it is contended that the situation with respect to the liquor traffic, as a result of the ratification of the Twenty-first Amendment to the Constitution of the United States, is in itself extraordinary and exceptional, in that this traffic has within the past fifteen years been the subject of two amendments to the Federal Constitution and amendments to the constitutions of almost every state in the Union. No other subject matter has occasioned two amendments to the Federal Constitution in the history of the nation.

POINT II.

DEFENDANTS HAVE NO AUTHORITY TO ASSESS AND COLLECT A TAX AGAINST THE MEANS BY WHICH THE STATE PERFORMS ITS GOVERNMENTAL FUNCTIONS, AND HENCE THIS IS NOT AN ACTION AGAINST THE UNITED STATES.

The reciprocal immunity from taxation existing between the United States and the several states in the performance of their respective governmental functions has been established and recognized by this court in innumerable decisions beginning with the case of **McCullough v. Maryland,** 4 Wheaton, 316, and ending with the case of **Trinityfarm Const. Co. v. Grosjean** of the present term decided March 5, 1934. It is unnecessary to cite the innumerable authorities on this point.

A. In the Operation of Complainant's Department of Liquor Control, the State is Performing a Purely Governmental Function.

The state's operation of its department of liquor control constitutes an exercise of its police power.

Long before the adoption of the Eighteenth Amendment of the Constitution of the United States, it was recognized by this court, and by the courts of last resort of the several states, that the authority to regulate, con-

trol or prohibit trafficking in intoxicating liquors lies in the police power of the states. It is unnecessary to cite even a small portion of the innumerable decisions upholding this principle. It is sufficient to mention a few of the decisions of this court:

Eberle v. Michigan, 232 U. S., 700, 34 S. Ct., 464, 58 L. Ed., 803;
Purity Extract, etc., Co. v. Lynch, 226 U. S., 192, 33 S. Ct., 44, 57 L. Ed., 184;
Lawton v. Steele, 152 U. S., 133, 14 S. Ct., 499, 38 L. Ed., 385;
Mugler v. Kansas, 123 U. S., 623, 8 S. Ct., 273, 31 L. Ed., 205;
Bartmeyer v. Iowa, 18 Wall., 129, 21 L. Ed., 929;
License Cases, 5 How., 504, 12 L. Ed., 256.

The state of Ohio has, of course, long adhered to this doctrine.

The State v. Hipp, 38 O. S., 199;
Bloomfield v. State, 86 O. S., 253.

In his work on Constitutional Limitations, 8th Ed., Judge Cooley, in Volume II thereof, under Chapter 16, entitled "The Police Power of the States", includes a full discussion of "Restraints on Sale of Liquors", beginning at page 1250.

Police power has been variously defined by innumerable courts and text writers. It is defined in Cooley's Constitutional Limitations, 8th Ed., Volume II, page 1223, as follows:

> "The police of a state, in a comprehensive sense, embraces its whole system of internal regulation, by which the state seeks not only to preserve the public

> order and to prevent offenses against the state, but also to establish for the intercourse of citizens with citizens those rules of good manners and good neighborhood which are calculated to prevent a conflict of rights, and to insure to each the uninterrupted enjoyment of his own so far as is reasonably consistent with a like enjoyment of rights by others."

This same author at page 1226 quotes the language of the Supreme Court of Ohio in **Leonard v. State**, 100 O. S., 456, 127 N. E., 464, as follows:

> "The dimensions of the government's police power are identical with the dimensions of the government's duty to protect and promote the public welfare. The measure of police power must square with the measure of public necessity. The public need is the polestar of the enactment, interpretation, and application of the law."

It is difficult to conceive of a function at the present time more directly designed for the protection of the public health, safety, welfare and morals than the control of the liquor traffic, and hence more directly and exclusively a pure governmental function. In its nature it goes to the very essence of government, that of promoting the general welfare. The preamble to the Constitution of the United States of 1787 states the purpose of that Constitution, among other things, to "promote the general welfare". Could it be said that a federal activity admittedly for that purpose was not an activity purely governmental in its nature? The preamble of the Ohio Constitution likewise sets forth that it is the purpose of the Constitution to promote the "common wel-

fare". Obviously a function of the state government for that purpose must be governmental in its nature.

Among a number of cases recognizing the governmental character of functions controlling the liquor problem, attention is directed to the case of **Plumb v. Christie**, 103 Ga., 686, 30 S. E., 759, the fourth branch of the syllabus by the court reading as follows:

> "The General Assembly of this state, by virtue of its police powers, has the authority to regulate and control the sale of all intoxicating liquors, and can establish dispensaries for an exclusive sale of such liquors, under the management of agents or officials created for this purpose."

The following language of the court at page 695 is particularly pertinent to the instant case:

> "It is further urged that the Legislature has no right to authorize a municipality to so embark into a commercial business for profit and gain. **It is manifest that the primary object of this dispensary act was not for the purpose of gain, and embarking a municipality in a commercial enterprise, but that the end and purpose had in view was a regulation of the sale of an injurious and dangerous beverage, in the interest of temperance, and for the purpose of throwing a safeguard around the morals of the people.** The revenue derived from this source was merely one of its incidental features. We do not mean to say, however, that the Legislature has not the power to confer upon a municipality a right to conduct such a business purely as a matter looking to an increase in its revenue from the profits that might accrue. Our attention has been called to no provision in the Constitution, either expressly or by fair implication, denying to the Legislature the right to clothe a municipality with such a privilege. Nor

> do we mean to say that the Legislature has the right to create a monopoly of any one of the ordinary callings of life which one has a right to pursue, so long as its pursuit does not involve evil or danger to society; but when the state bestows a privilege which is not a common, natural right, such as the right to engage in the liquor traffic, it may create a monopoly, and yet no right of the individual be violated. It has often been held that monopolies may be created, even in such business as may fall within the ordinary callings of life, where an indiscriminate conduct thereof by individuals under certain cirsumstances and in certain places might be injurious to the common welfare. These principles are fully discussed in Tiedman's Limitations of Police Power (Section 105). On pages 323, 324, and 325 of that work are cited a number of cases sustaining these views, and others in apparent conflict. The author himself adopts the doctrine laid down by the Supreme Court of the United States in the Slaughter House Cases." (Boldface ours.)

Again, in the case of **Dispensary Comrs. v. Thornton**, 106 Ga., 106, 31 S. E., 733, the syllabus by the court is as follows:

> "The dispensary commissioners appointed under the local dispensary act for Terrell county, approved December 10, 1897 (Acts 1897, p. 562), are governmental officials, and not liquor dealers, within the meaning of the tax act of 1896."

It is submitted that when a state in the exercise of its police power, for the purpose of controlling the liquor traffic, prohibits the private business of wholesaling, and retailing by the package, of spirituous liquor, and itself takes over that function for the protection of its citizens from, on the one hand the unscrupulous liquor dealer, and

on the other hand the bootlegger, that state is performing a most vital governmental function. This, complainant contends, has always been true, but it is now doubly true in view of America's experience during the last fifteen years

The adoption of the Eighteenth Amendment, followed by the adoption of the Twenty-first Amendment, has indisputably placed complainant's operation of its department of liquor control in the category of a governmental function.

The functions of government which are governmental in their nature are not fixed and static things. They are changing as conditions change, and as the experience of the people demonstrates the necessity for change. The long line of decisions of this court with respect to the police power of the state or nation supports this statement. While it might possibly have been contended prior to the adoption of the Eighteenth Amendment, in recognition of the theretofore existing fact, that the liquor business was a business ordinarily conducted by individuals, such contention may no longer be made, for the reason that **as a result of the liquor business having been conducted by individuals the nation adopted the Eighteenth Amendment and prohibited its conduct.**

The abuses arising from the attempted abolition of this business in its entirety resulted in the adoption of the Twenty-first Amendment, returning the problem to the states.

This court is therefore here confronted with a question involving a traffic in which individuals have not for

years been engaged,—a traffic which the state of Ohio, for the protection of its citizens from abuses of the private liquor dealer and the bootlegger, has seen fit in the exercise of its police power to take over as a purely governmental function. **The state has not seen fit to return this traffic to the individual. To that extent, Ohio still has prohibition.**

The function of the state in controlling the liquor traffic, as a result of the fundamental changes during the past fifteen years, is in an entirely different category than ever before. It is necessary to further comment upon these changes. We quote from the report submitted to the president of the United States January 15, 1931, by George W. Wickersham, chairman of the national commission on law observance and enforcement, on the enforcement of the prohibition laws of the United States, commonly referred to as the "Wickersham Report", at page 5:

> "On April 4, 1917, a joint resolution was introduced in the senate, proposing an amendment to the Constitution prohibiting the manufacture, the sale or transportation of intoxicating liquors within, the importation thereof into, and the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes. In the course of the debate over this resolution, reference was made to the fact that twenty-six states had enacted state prohibition laws, that more than 60 per cent of our people and 80 per cent of the territory of the United States at that time were living under prohibition."

The development of conditions, the recurrence of which the state of Ohio in the exercise of its governmental functions seeks to preclude, is clearly set forth in this same report on page 6 in the following language:

> "Two features of the history of liquor control in the United States are of special importance for our present purpose, namely, the effect of industrial organization and consequent methods of manufacture and sale upon production and consumption of liquor and the effect of this and of organizations of producers upon politics. Much of the failure of the system of liquor control devised in nineteenth century America was due to their presupposing an economic situation which was ceasing to exist. For example, the high license system sought to insure responsible local sellers of good character and standing who might reasonably be expected to conform to the regulations imposed by local opinion and expressed in local laws. But the days of the old independent local tavern keeper were gone. The business of brewing and that of distilling came to be organized. **The local brewer and local distiller supplying a limited local trade gave way to great corporations, organized on modern lines, each prepared to do a huge business and seeking to expand by finding new markets and increasing their business in old markets.** Competition between these corporations was keen. Methods of production and distribution were improved continually. Sales organization was developed. **More and more the local seller ceased to be independent and became a mere creature of some producer.** Thus there was every pressure upon the seller to sell as much as possible and to as many as possible. Legislation preventing such corporations from holding licenses was not hard to evade and ran counter to the settled economic current. **Commercialized production and distribution, under the economic order of the twentieth century, became a great evil.**

> No less an evil grew up through the political activities and influence of organizations of producers, working through their local dependents. The corrupting influence upon legislation and upon administration and police in our large cities was conspicuous and growing. The steady progress of state prohibition and local option was largely coincident with the growing power of these organizations and due to public resentment thereat." (Boldface ours.)

These evils gave the entire nation prohibition; they were largely the cause of the Eighteenth Amendment. It is a return of these abuses of the private liquor dealer, which the state has precluded by its state monopoly. **In so far as the individual wholesaling and retailing by the package of spirituous liquor is concerned, Ohio still has prohibition.** The state of Ohio has not taken over the function of dispensing intoxicating liquor by the glass, but the state has, in order to combat the basic evil giving rise to prohibition, seen fit to monopolize what was once a private and highly competitive system of distribution of spirituous liquor.

Had the Eighteenth Amendment been modified in accordance with the suggestion contained in the separate report of Henry W. Anderson of the Wickersham Commission, pages 89 to 109 of that report, supra, resulting in federal control, and monopoly, we submit that the performance of such a function by the federal government would have been purely governmental and exempt from state taxation. The same must be true here in the case of the state, in view of the Twenty-first Amendment.

If it might be contended that prior to the adoption of

the Eighteenth Amendment the commercialized distribution of spirituous liquor was a proprietary function, as distinguished from a governmental function, because until then it had always been a private business, but such a contention is obviously now untenable because this traffic which the state has monopolized has been abolished for more than fourteen years. **It is submitted that there is no function which complainant in this case might exercise at the present time which is so entirely governmental in its nature as the function here sought to be interfered with, burdened and curtailed by defendants.**

B. The Federal Statutes do Not Levy a Tax Against a State Which Sells and Distributes Intoxicating Liquor.

The commissioner of internal revenue and the internal revenue collectors in the four internal revenue districts in Ohio are statutory officers. The source and measure of the authority of those officers can emanate only from the acts of Congress which specify the objects to be taxed and which direct the assessment and collection of the same and which define the duties of such officers in respect to the assessment and collection of such taxes. These officers cannot on their own volition impose a tax on any property or occupation. Their authority for so doing must be conferred upon them by the provision of some act of Congress, which, in the instant case, is claimed by the defendants to be conferred by 26 U. S. C. A., Section 11 (Revised Statute 3140); 26 U. S. C. A.,

Section 181 (Revised Statute 3232); 26 U. S. C. A., Section 193 (Revised Statute 3281); and 26 U. S. C. A., Section 205 (Revised Statute 3244). Those statutes express in clear terms an intent on the part of Congress to impose a special tax on the occupation and business of selling intoxicating liquor at wholesale or retail. The words "state" and "person" are defined in 26 U. S. C. A., Section 11 (Revised Statute 3140), as follows:

> "The word 'State,' when used in this title, shall be construed to include the Territories and the District of Columbia, where such construction is necessary to carry out its provisions. And where not otherwise distinctly expressed or manifestly incompatible with the intent thereof, the word 'person,' as used in this title, shall be construed to mean and include a partnership association, company or corporation, as well as a natural person."

The definition of the word "person" given in the section just quoted clearly shows that Congress did not intend to include a state within the provisions of Chapters 2 and 4 of Title 26 U. S. C. A., which, among other things, relate to the levy and collection of a special excise tax upon the business or occupation of dealing in intoxicating liquor at wholesale or retail. If it was intended by Congress to include a state in the term "person", as defined in 26 U. S. C. A., Section 11 (Revised Statute 3140), and used in Chapters 2 and 4 of Title 26 U. S. C. A., it could have been done by expressly so providing without the necessity of being read into the section by a court. In other words, if the conducting of state liquor stores by a state was to be subject to the special occupational tax

imposed by 26 U. S. C. A., Section 205 (Revised Statute 3244), it is certain that such tax would have been provided for in language which would have left no doubt as to the intention of Congress. It must be borne in mind that at the time 26 U. S. C. A., Section 11 (Revised Statute 3140), was enacted there was no state in the Union engaged in the retailing or wholesaling of spirituous liquor. At that time the only persons who were allowed to sell or who did sell or engage in the business of selling intoxicating liquor were natural persons or private corporations. And in most instances, the states and the federal government required such persons and corporations to take out licenses to engage in such business. A monopoly by a state in respect to the sale and distribution of intoxicating liquor was not at that time known. Thus, the word "person" could not have been used by Congress in the statutes cited to mean or include a state, its officers or employes. It is a well settled rule of statutory construction in construing a statute that words are to be taken in their ordinary sense unless from the whole context a different meaning was intended. Giving to the term "person" its broad and commonly understood meaning, it follows that 26 U. S. C. A., Section 11 (Revised Statute 3140), deals with individuals, associations, co-partnerships and corporations, since a state is not a person within the ordinary or legal definition of that word.

Mr. Justice Field in **United States v. Fox**, 94 U. S., 315, at page 321, said that:

> "The term 'person' as here used applies to natural persons, and also to artificial persons — bodies

politic, deriving their existence and powers from legislation,—but cannot be so extended as to include within its meaning the federal government. It would require an express definition to that effect to give it a sense thus extended. And the term 'corporation' in the statute applies only to such corporations as are created under the laws of the State."

Likewise, **In the Matter of Will of Fox**, 52 N. Y., 530, at 535, it was said that:

> "The word 'person', when used in a statute, will, unless the meaning is restricted by the context, be deemed to include corporations. They are artificial persons; bodies politic, possessing some of the attributes of natural persons, and are subject to many of the obligations and duties imposed by law upon individuals. * * * But no authority has been referred to showing that the word person, when used in a statute, may, without further definition, be held to embrace a state or nation."

In the case of **Lowenstein v. Evans**, 69 Fed., 908, the first branch of the headnote is as follows:

> "The act of July 2, 1890 (26 Stat., 209, c. 647), to protect trade and commerce against unlawful restraints and monopolies, is not applicable to the case of a state which, by its laws, assumes an entire monopoly of the traffic in intoxicating liquors (Act S. C. Jan. 2, 1895). A state is neither a 'person' nor a 'corporation' within the meaning of the act of Congress."

See, also:

McBride v. Board of Commissioners of Pierce County, 44 Fed., 17, 18;
Berton v. All Persons—Calif., 170 Pac., 151.

It is also to be noted that Congress did not include within the definition of the word "person", as contained in 26 U. S. C. A., Section 11 (Revised Statutes, 3140), the phrase "body corporate or politic". Even if that phrase had been used, it would not include a state.

Des Moines County v. Harker, 34 Ia., 84;
Lowenstein v. Evans, 69 Fed., 908, 911.

It also must be borne in mind that a state accurately speaking is not a corporation, since the state is self-existing, whereas a corporation is an entity created by a state. Such general terms as "person" and "corporation" appear in the statutes cited in reference to natural and artificial beings and in no instance does the language contained in those statutes require, or by implication make it necessary, that a different or more inclusive meaning be given to those terms. Those general terms, as defined by Congress, were not intended to embrace a state. Furthermore, there is nothing in the pertinent federal statutes which, either in express terms or by necessary implication, indicates that it was the purpose of Congress to impose an excise tax upon the activities of a state engaged in distributing intoxicating liquor by it in a governmental or proprietary capacity. The failure of Congress to include the states in the definition of the term "person" could not have been inadvertent since the states are not commonly thought of as persons. As stated by Woods, circuit judge, in **Davis v. Pringle**, 1 Fed. (2d Ed.), 860, at page 863:

> "If it had been intended that 'person' should have such a comprehensive and unusual meaning as to

include them (states), the framers of the definition would have said so." (Insertion ours.)

It was stated in the case of **Mayrehofer v. Board of Education**, 89 Calif., 110, 26 Pac., 646, that the reason a state is not bound by general words in a statute is because it "would operate to trench upon its sovereign rights, injuriously affect its capacity to perform its function, or to establish a right of action against it."

The Legislature of the state of Ohio, by the enactment of House Bill No. 1, has declared that the sale of liquor by the state of Ohio is essential and necessary for the preservation of the public welfare, safety and well-being. (See Sec. 68 of the Ohio Act, pp. 71, 72 of Complainant's Bill of Complaint.) It would grievously retard, impede and burden the sovereign right of the state to execute its sovereign power, to subject it to laws that were intended by Congress for persons and artificial entities other than states. If the defendants have the power under the statutes cited to interfere with the operations of the state of Ohio by compelling compliance on its part with the special excise laws in question, then the potential existence of the sovereignty of the state of Ohio is at the mercy of the federal government. Certainly in the absence of express words by Congress requiring it, this court should not hold that it was intended by Congress to subject a sovereign state to the payment of the special excise taxes complained of.

It also must be borne in mind that if the taxes to be collected must be paid, the same will be paid either out

of the treasury of the state of Ohio or by its employes. In either event, a state or the instrumentality of a state would be subjected to a federal tax.

Even if it could be said that the rule of reciprocal immunity from taxation is not applicable to the activity of a state which engages in the sale and distribution of liquor at retail and that Congress has the power to tax a state while engaged in that function, nevertheless that activity cannot be taxed until Congress speaks. That power, if it exists, has not been exercised by Congress. The acts of Congress involved in this suit contain no language imposing the special excise taxes complained about on a state, and there is no language which implies that Congress intended to tax a state. Consequently, the demand of the defendants for the payment of such taxes from the state of Ohio in the operation of its state liquor stores is without authority in law and clearly illegal.

C. It Follows That This is Not an Action Against the United States.

In view of the fact that defendants have no authority to assess and collect a tax against the state of Ohio, it necessarily follows that this is an action to enjoin defendants from committing acts under color of office which are neither authorized by the statutes of the United States nor by its Constitution. A similar situation was presented to this court in the case of **Philadelphia Co. v. Stimson, Secty. of War**, 223 U. S., 605, 56 L. Ed., 570, in which the plaintiff sought an **injunction** against such

secretary to restrain him from causing the arrest of the plaintiff for the violation of a mandate or order of such secretary, who purported to act under authority of the Act of Congress of March 3, 1899, Sections 11, 12 and 17. In that case it was contended that such suit was, in reality, one against the United States. This court in its opinion observed at page 620:

> "The complaint did not ask the court to interfere with the official discretion of the secretary of war, but challenged his authority to do the things of which complaint was made. The suit rests upon the charge of abuse of power, and its merits must be determined accordingly; **it is not a suit against the United States.**" (Boldface ours.)

The same might be said of the suit at bar. The issue raised by the bill of complaint is that defendants have no authority to do the threatened acts.

It has been repeatedly held that the exemption of the United States from suit does not protect its officers from personal liability when they, under the color of their offices, illegally infringe upon the rights of others.

Little v. Barreme, 2 Cranch, 170, 2 L. Ed., 243;
United States v. Lee, 106 U. S., 196, 220, 221, 27 L. Ed., 171;
Belknap v. Schild, 161 U. S., 10, 40 L. Ed., 599;
Tindal v. Wesley, 167 U. S., 204, 42 L. Ed., 137;
Scranton v. Wheeler, 179 U. S., 141, 45 L. Ed., 126.

And such acts of federal officers may be enjoined.

Noble v. Union River Logging R. Co., 147 U. S., 165, 171, 172, 37 L. Ed., 123;
Payne v. Central Pac. Ry. Co., 255 U. S., 228, 65 L. Ed., 598;
American School v. McAnnulty, 187 U. S., 94, 47 L. Ed., 90;
Garfield v. U. S., ex rel. Goldsby, 211 U. S., 249, 261, 262, 53 L. Ed., 168;
Philadelphia Co. v. Stimson, 223 U. S., 605, 56 L. Ed. 570;
Work v. Louisiana, 269 U. S., 250, 70 L. Ed., 259;
Lane v. Watts, 234 U. S., 525, 540, 58 L. Ed., 1440.

POINT III.

THE CONSEQUENCES OF DEFENDANTS' ATTEMPT TO ASSESS AND COLLECT A TAX AGAINST THE STATE, TO THE OPERATIONS OF THE STATE GOVERNMENT.

The difficulties surrounding the application of the rule that the federal government is immune from state taxation in the operation of its governmental activities and the state government is likewise immune from federal taxation in the conduct of its governmental activities, are recognized. The effect in each given case must be given consideration. This court has very properly recognized its responsibility in deciding questions of this nature in preserving each government within its own sphere without undue interference by the other. As stated in

Educational Films Corp. v. Ward, 282 U. S., 391, 392, 75 L. Ed., 400:

> "This court, in drawing the line which defines the limits of the powers and immunities of state and national governments, is not intent upon a mechanical application of the rule that government instrumentalities are immune from taxation, regardless of the consequences to the operations of government. The necessity for marking those boundaries grows out of our constitutional system, under which both the federal and the state governments exercise their authority over one people within the territorial limits of the same state. The purpose is the preservation to each government, within its own sphere, of the freedom to carry on those affairs committed to it by the Constitution, without undue interference by the other."

More recently this court said in **University of Illinois v. United States**, 289 U. S., 48, 77 L. Ed., 1025:

> "The principle invoked by the petitioner, of the immunity of state instrumentalities from federal taxation, has its inherent limitations. Fox Film Corp. v. Doyal, 286 U. S., 123, 128. It is a principle implied from the necessity of maintaining our dual system of government. Collector v. Day (Buffington v. Day), 11 Wall., 113, 127; Willcuts v. Bunn, 282 U. S., 216, 225; Indian Motocycle Co. v. United States, 283 U. S., 570, 575. Springing from that necessity it does not extend beyond it. Protecting the functions of government in its proper province, the implication ceases when the boundary of that province is reached."

It is submitted that there is no question but that the operation of complainant's department of liquor control is a function of the state's government in its proper prov-

ince, and hence it becomes necessary to consider whether or not the imposition of federal taxation upon this instrumentality of the state constitutes a deprivation of the protection guaranteed by the federal Constitution. The taxation of this instrumentality which the state is exercising under its police power would authorize the destruction of that police power. Instead of destroying police regulations, this court has consistently upheld them.

Noble State Bank v. Haskell, 219 U. S., 104, 55 L. Ed., 112;
Mugler v. Kansas, 123 U. S., 623, 31 L. Ed., 205.

The inevitable result and consequence of taxing this state instrumentality is to interfere therewith and destroy the same, thereby returning to the federal government the power to prohibit the business of wholesaling and retailing in packages spirituous liquor, a power expressly taken away from the federal government by the adoption of the Twenty-first Amendment of the Constitution of the United States.

The revenue of which the federal government would be deprived by a decision of this court supporting complainant's contentions would not be great in amount.

The exemption of the state from taxation in this case, however, is not dependent upon weight of burden or the extent of the resulting interference with sovereign independence. As stated by this court in **Trinityfarm Construction Co. v. Grosjean** of the present term decided March 5, 1934:

> "The appellant seeks reversal on the ground that the contracts are federal means or instrumentalities,

that the enactments referred to impose a direct burden upon them and that the state was without power to impose the tax. And on that basis it seeks to invoke the rule that, consistently with the federal Constitution, a state may not tax the operations of an instrument employed by the government of the Union to carry its powers into operation. That principle, while not expressly stated in the Constitution, necessarily arises out of our dual government. It has often been given effect. **And reciprocally it safeguards every state against federal tax on its governmental agencies or operations. Its application does not depend upon the amount of the exaction, the weight of the burden or the extent of the resulting interference with sovereign independence. Where it applies, the principle is an absolute one wholly unaffected by matters or distinctions of degree. Indian Motocycle Co. v. United States, 283 U. S., 570, 575, and cases cited.** Its right application is essential to the orderly conduct of the national and the state governments and the attainment of justice as between them." (Boldface ours.)

Pertinent to a consideration of the consequences of defendants' attempt to assess and collect the tax here under consideration, attention is directed to the case of **South Carolina v. United States**, 199 U. S., 437, hereinafter more fully commented upon, which case was referred to in the case of **Murray v. Wilson Distilling Co.**, 213 U. S., 173, 53 L. Ed., 742, wherein the court said:

"The decision of the questions arising upon this record, relating, as they do, to rights and remedies of a mere contract creditor of the state of South Carolina, is not in anywise controlled by the ruling in South Carolina v. United States, 199 U. S., 437, where, although recognizing that official dispensers of liquors under the laws of South Carolina were

agents of the state, it was held (p. 463), 'that the license taxes charged by the federal government upon persons selling liquor are not invalidated by the fact that they are agents of the state, which has itself engaged in that business.' **That case was concerned with the power of a state, by virtue of its legislation in regard to the sale and consumption of liquor, to destroy a pre-existing right of taxation possessed by the government of the United States.**" (Boldface ours.)

The court is not here concerned with the destruction by a state of a "pre-existing right of taxation possessed by the government of the United States",—this for the reason that the United States has not for the past fifteen years had any right to tax the liquor business here under consideration, it having been during that interval prohibited; furthermore, since the adoption of the Twenty-first Amendment of the Constitution of the United States any right to tax this business is dependent, in the first instance, upon the state permitting the business to be conducted therein. To the extent that a state, since the Twenty-first Amendment, authorizes a return of this business by private individuals, to that extent is the right of the federal government to tax the same conferred.

There is no question here of interference with or danger to the sources of federal revenue. The liquor traffic has become primarily a problem of welfare, health and morals; it is no longer a problem of revenue. Whatever revenue aspects the problem has have become purely secondary. True, the liquor traffic was heretofore de-

cidedly a matter of revenue and as a result of this the nation adopted prohibition. We quote on this point from the report of the Rockefeller Foundation on the liquor problem, entitled "Toward Liquor Control" at pages 18 and 19:

> "While many states will doubtless follow the license method in the control of beverages of higher alcoholic content, this method contains a fundamental flaw in that it retains the private profit motive which makes inevitable the stimulation of sales.
>
> Wide experience in many countries indicates that the best approach of the problem of heavier alcoholic beverages is through state control. By state control we mean specifically a system by which the state, through a central authority, maintains an exclusive monopoly of retail sale for off-premises consumption. This authority determines prices, fixes the location of its stores, controls advertising, and in general manages the trade in such a way as to meet a minimum, unstimulated demand within conditions established solely in the interests of society.
>
> **The primary objective of taxation should be social control, not revenue."** (Boldface ours.)

The inevitable result of viewing the question as a revenue problem must result in returning to actual, if not nominal, prohibition, with a return of the evils thereof. **This traffic in spirituous liquors ceased to be a revenue traffic upon the adoption of the Eighteenth Amendment, and the adoption of the Twenty-first Amendment did not return it to this category in states which adopt a state monopoly.** If the lawful liquor traffic is to be again viewed as a traffic for revenue by either state or nation, it must again revert to the bootlegger. Experience has removed it from this category.

POINT IV.

THE CASE OF SOUTH CAROLINA VS. UNITED STATES, (199 U. S., 437), IS NOT INCONSISTENT WITH COMPLAINANT'S POSITION.

In the case of **South Carolina v. The United States**, 199 U. S., 437, 50 L. Ed., 265, decided in 1905, the court laid down the following rules of law:

1. That which is implied is as much a part of the Constitution as that which is expressed therein, and among those matters which are implied is that the nation may not prevent the state from exercising its ordinary function of government.

2. The exemption of state agencies from natural taxation is limited to those of governmental character and does not extend to those used by the state in carrying on a private business.

3. The Constitution is a written instrument and, as such, its meaning does not change. Its language as a grant of power to the national government is general and as changes come in social and political life it embraces all new conditions within the scope of the powers conferred.

See 4 Rose's Supp. Notes of U. S. Reports.

In the South Carolina case the court had before it the consideration of a state dispensary system established by the state of South Carolina in 1895, primarily for reve-

nue, which was materially different from that presented in the instant case. **Under the South Carolina law, the dispensaries were operated by a dispenser licensed by a county board of control. Under the Ohio law, the state owned stores are operated by civil service employes of the state government.** In the instant case, instead of being concerned with a matter of taxing natural persons who were licensed by the state, we are here concerned with the matter of the taxation of the state itself. The two cases are clearly distinguishable.

It is pertinent to note that although this South Carolina case has since been cited by this court, it has been cited only as authority for the principle that a private business enterprise of the state, as distinguished from a governmental function, may be taxed by the federal government. In no single case has this court cited the South Carolina case as authority in support of the principle that the exercise of a state monopoly of the spirituous liquor business is a private business and not the performance of a governmental function. As hereinabove shown, whatever may have been the situation in 1905 as to this function being proprietary rather than governmental, at the present time it is strictly governmental.

CONCLUSION.

In conclusion, it is respectfully submitted that unless this court will permit this bill of complaint to be filed, the state is confronted with the arrest of over 187 of its officers and employes, the confiscation of its property of a

value of four and a half million dollars, and the necessity of litigating a multiplicity of actions in state and federal courts.

It is further submitted that in the operation of its department of liquor control the state is performing a function which has become purely governmental, made so by the adoption of the Twenty-first Amendment to the Constitution of the United States.

It is further submitted that the statutes of the United States do not impose a tax upon the state in the performance of its governmental functions and accordingly the threatened acts of defendants are unauthorized and may be enjoined

It is further submitted that the issue in this case, involving the question of whether in states having a liquor monopoly the traffic shall be considered as a traffic for revenue, will determine the fate of the most recent amendment of the federal Constitution upon the most vital and controversial question since slavery, and hence is a case of most unusual and exceptional aspects.

Wherefore, complainant's motion for leave to file a bill of complaint in this case should be granted and the immediately pressing question of the powers of the federal government and complainant as well as other states having adopted a state liquor monopoly adjudicated.

Respectfully submitted,

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Attorneys for Complainant.

APPENDIX.

Article III, Section 2, Constitution of the United States.

* * * * * * * * * * * * * * *

In all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be party, the Supreme Court shall have original jurisdiction. * * *

Article XVIII, Constitution of the United States.

After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.

The Congress and the several states shall have concurrent power to enforce this article by appropriate legislation.

* * * * * * * * * * * * * * *

Article XXI, Constitution of the United States.

The Eighteenth Article of Amendment to the Constitution of the United States is hereby repealed.

The transportation or importation into any state, territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

Revised Statute 3140 (26 U. S. C. A., Sec. 11); Feb. 27, 1877, c. 69, § 1, 19 Stat., 248.

"State" and "person" defined. The word "state," when used in this title, shall be construed to include the territories and District of Columbia, where such construction is necessary to carry out its provisions. And where not otherwise distinctly expressed or manifestly incompatible with the intent thereof, the word "person", as used in this title, shall be construed to mean and include a partnership, association, company or corporation, as well as a natural person.

Revised Statute 3232 (26 U. S. C. A., Sec. 181).

Trade or business prohibited until special tax paid. No person shall be engaged in or carry on any trade or business hereinafter mentioned until he has paid a special tax therefor in the manner hereinafter provided.

Revised Statute 3233 (26 U. S. C. A., Sec. 182).

Trade or business to be registered. Every person engaged in any trade or business on which a special tax is imposed by law shall register with the collector of the district his name or style, place of residence, trade or business, and the place where such trade or business is to be carried on. In case of a firm or company, the names of the several persons constituting the same, and their places of residence, shall be so registered.

Revised Statute 3235 (26 U. S. C. A., Sec. 184).

Payment of one tax covering several places of business. The payment of the special tax imposed shall not exempt from an additional special tax the person carry-

ing on a trade or business in any other place than that stated in the collector's register; but nothing herein contained shall require a special tax for the storage of goods, wares, or merchandise in other places than the place of business, nor, except as hereinafter provided, for the sale by manufacturers or producers of their own goods, wares, and merchandise, at the place of production or manufacture, and at their principal office or place of business, provided no goods, wares, or merchandise shall be kept except as samples at said office or place of business.

Revised Statute 3281 (26 U. S. C. A., Sec. 193); Feb. 8, 1875, c. 36, § 16, 18 Stat., 310.

Carrying on business without payment; forfeitures; rectifiers; wholesale liquor dealers, and so forth. Any person who shall carry on the business of a rectifier, wholesale liquor dealer, retail liquor dealer, wholesale dealer in malt liquors, retail dealer in malt liquors, or manufacturer of stills, without having paid the special tax as required by law, shall, for every such offense be fined not less than $100 nor more than $5000 and imprisoned not less than thirty days nor more than two years. And all distilled spirits or wines, and all stills or other apparatus, fit or intended to be used for the distillation or rectification of spirits, or for the compounding of liquors, owned by such persons, wherever found, and all distilled spirits or wines and personal property found in the rectifying establishment, or in any building, room, yard, inclosures connected therewith, and used with or constituting a part of the premises shall be forfeited to the United States.

Revised Statute 3244 (26 U. S. C. A., Sec. 205); Feb. 8, 1875, c. 36, § 18, 18 Stat., 311; Feb. 18, 1875, c. 80, § 1, 18 Stat., 319; March 1, 1879, c. 125, §§ 4, 10, 20, Stat. 333, 342.

Special taxes; retail and wholesale liquor dealers; retail and wholesale dealers in malt liquors. (a) Retail liquor dealers. Retail dealers in liquor shall pay $25. Every person who sells or offers for sale foreign or domestic distilled spirits, wines or malt liquors otherwise than as hereinafter provided in less quantities than five wine gallons at the same time shall be regarded as a retail dealer in liquors.

(b) Wholesale liquor dealers. Wholesale liquor dealers shall each pay $100. Every person who sells, or offers for sale foreign or domestic distilled spirits, wines or malt liquors, otherwise than as hereinafter provided in quantities of not less than five wine gallons at the same time shall be regarded as a wholesale liquor dealer.

(c) Retail dealers in malt liquors. Retail dealers in malt liquors shall pay $20. Every person who sells or offers for sale malt liquors in less quantities than five gallons at one time, but who does not deal in spirituous liquors, shall be regarded as a retail dealer in malt liquors.

* * * * * * * * * * * * *

Revised Statute 3224 (26 U. S. C. A., Sec. 154).

Restraining assessments or collection of taxes. No suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court.

FILE COPY

No. ——, Original

In the Supreme Court of the United States

October Term, 1935

THE STATE OF OHIO, COMPLAINANT

v.

GUY T. HELVERING, AS AN INDIVIDUAL AND AS COMMISSIONER OF INTERNAL REVENUE, AND THOMAS J. CONNOR, CARL E. MOORE, HARRY F. HUBER, AND CHARLES H. GRAVER, AS INDIVIDUALS AND AS UNITED STATES COLLECTORS OF INTERNAL REVENUE IN THE STATE OF OHIO

ON RULE TO SHOW CAUSE WHY LEAVE TO FILE BILL OF COMPLAINT SHOULD NOT BE GRANTED

RESPONSE TO THE RULE TO SHOW CAUSE, AND BRIEF IN SUPPORT THEREOF

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In the Supreme Court of the United States

OCTOBER TERM, 1933

No. —, Original

THE STATE OF OHIO, COMPLAINANT

v.

GUY T. HELVERING, AS AN INDIVIDUAL AND AS COMMISSIONER of Internal Revenue, and Thomas J. Connor, Carl E. Moore, Harry F. Busey, and Charles H. Graves, as Individuals and as United States Collectors of Internal Revenue in the State of Ohio

ON RULE TO SHOW CAUSE WHY LEAVE TO FILE BILL OF COMPLAINT SHOULD NOT BE GRANTED

RESPONSE TO THE RULE TO SHOW CAUSE

Now come the defendants above named, by the Solicitor General, and for their response to the rule to show cause issued by this Court on April 9, 1934, say that the motion for leave to file the bill should not be granted, for the following reasons:

1. The cause is not within the original jurisdiction of this Court, because four of the defendants are citizens of the complainant State.

2. The prosecution of the suit is prohibited by Section 3224, Revised Statutes.

3. Complainant has a plain, adequate, and complete remedy at law.

4. The United States is the real party in interest, which may not be sued without its consent.

5. The merits are settled against the complainant's contention by *South Carolina* v. *United States,* 199 U.S. 437.

And in support of this response, the defendants ask leave to file the brief hereto attached.

Wherefore the defendants pray that the motion for leave to file the proposed bill be denied, and the rule discharged.

J. CRAWFORD BIGGS,
Solicitor General.

APRIL 1934.

BRIEF ON BEHALF OF THE DEFENDANTS, IN SUPPORT OF THEIR RESPONSE TO THE RULE

JURISDICTION

The motion was submitted April 2, 1934. The rule to show cause issued April 9, returnable on April 30.

Jurisdiction is asserted under the Constitution of the United States, Article III, Section 2, Clause 2. The existence of jurisdiction is disputed.

QUESTIONS PRESENTED

1. Whether this Court has original jurisdiction of a suit by a State, against a citizen of another State and four citizens of the complainant State, to enjoin the enforcement, against liquor stores operated by the State, of the Federal taxes on retail and wholesale liquor dealers.

2. Whether such a suit is prohibited by Section 3224, Revised Statutes.

3. Whether this suit may be maintained where the complainant has a plain, adequate, and complete remedy at law.

4. Whether the United States is the real party in interest.

5. Whether the bill presents a substantial question on the merits.

STATUTES INVOLVED

These are set forth in the Appendix, *infra,* pp. 17–18.

STATEMENT

This is a motion by the State of Ohio for leave to file an original bill.

The defendants are the Commissioner of Internal Revenue, who is stated to be a citizen of Kansas, and the Collectors of Internal Revenue for the four Ohio districts, who are stated to be "residents" of Ohio (Bill, p. 10).

The bill sets out that by an Act of the General Assembly passed December 22, 1933, Ohio concluded to create a state monopoly of the distribution and sale of spirituous liquor, and is about to open 187 state liquor stores (pp. 10–11). The defendant Busey (one of the Collectors) has notified the Ohio authorities that each of these stores is subject to the special tax on retail liquor dealers imposed by Section 3244, Revised Statutes (U.S.C., Title 26, Sec. 205, *infra,* p. 17), and also that the State is subject to the tax on wholesale dealers imposed by the same section; and the defendants have threatened and intend to levy and collect these taxes (pp. 11–12). Complainant asserts that it is not subject to these taxes by the terms of the Act, and cannot constitutionally be made subject to them (p. 12). Certain considerations to justify relief in equity are suggested (pp. 12–13) and the prayer is that the Court enjoin the enforcement of the taxes as against complainant and its agencies (pp. 14–15).

SUMMARY OF ARGUMENT

1. The cause is not within the original jurisdiction of this Court, because four of the defendants are citizens of the complainant State.

2. Injunction will not lie to restrain the collection of a Federal tax. Section 3224, Revised Statutes, has been uniformly applied even where it appears that the tax is illegal or unconstitutional. To make this section inapplicable there must exist special and extraordinary circumstances, which do not exist in this case.

3. The Government has provided a complete system of corrective justice in the administration of its revenue laws, which is founded upon the idea of appeals within the executive departments, where if the party aggrieved cannot obtain satisfaction, there are provisions for recovering the tax after it is paid, by suit against the collecting officer, or against the United States. Complainant has an adequate remedy at law by paying the tax and suing for its recovery.

4. The tax which is challenged is one provided for the operation of the general Government. The defendants have no personal interest in the collection of the tax. The acts complained of are the acts of the defendants in their official capacities, done under color of their offices in the performance of an official duty. Hence the United States is the real party in interest, and it cannot be sued without its consent.

5. The merits have already been decided against complainant's contention.

ARGUMENT

I

THIS CAUSE IS NOT WITHIN THE ORIGINAL JURISDICTION OF THIS COURT

The suit is by the State of Ohio against five individuals, one of whom is stated to be a citizen of Kansas, and the other four to be "residents" of Ohio (Bill, p. 10). Since these four are Collectors of Internal Revenue (p. 10) they may be assumed to be citizens of the United States, and are therefore also citizens of the State wherein they reside (Fourteenth Amendment, Sec. 1), that is, of Ohio.

The original jurisdiction of this Court depends wholly on the character of the parties; in cases where the existence of judicial power depends on the fact that the Constitution or laws of the United States are involved, the jurisdiction is appellate only. *Cohens* v. *Virginia,* 6 Wheat. 264, 392–399. It is accordingly well settled that this Court has no original jurisdiction of a suit by a State against its own citizens, nor of one to which such citizens are necessary parties defendant; and this is true although the case involves a constitutional question. *Pennsylvania* v. *Quicksilver Company,* 10 Wall. 553; *California* v. *Southern Pacific Company,* 157 U.S. 229, 257–262; *Minnesota* v. *Northern Securities Company,* 184 U.S. 199, 235, 237–

238, 247; *New Mexico* v. *Lane,* 243 U.S. 52, 58; *Texas* v. *Interstate Commerce Commission,* 258 U.S. 158, 163–164.

The question, therefore, is whether the four Collectors are necessary parties defendant. The bill is to prevent the application of the Federal taxes on retail and wholesale liquor dealers to the complainant's stores, and specifically to enjoin the collection of such taxes, the requiring of returns, the levy and distraint of property, and the institution of suits for penalties (Bill, pp. 14–15). All the things to be enjoined are within the express statutory duty of Collectors. (Collection of Taxes, R.S., Secs. 3183 and 3184 as amended, U.S.C., Title 26, Secs. 103, 104, 112; requiring returns, R.S., Secs. 3173, 3175, 3176 as amended, U.S.C., Title 26, Secs. 93, 94, 96, 97; distraint, etc., R.S., Secs. 3187–3202 as amended, U.S.C., Title 26, Secs. 116–131; collecting penalties, R.S., Sec. 3213 as amended, U.S.C., Title 26, Sec. 142; general duty to enforce the revenue laws, R.S. 3163 as amended, U.S.C., Title 26, Sec. 34.) The Collectors are not mere subordinates of the Commissioner of Internal Revenue (like the disbursing officer in *Miguel* v. *McCarl,* No. 435, present term), but are important officers of the Government, appointed by the President with the advice and consent of the Senate (R.S., Sec. 3142, U.S.C., Title 26, Sec. 14), and charged directly by statute to do everything which this bill endeavors to enjoin. They are, therefore, clearly necessary

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parties defendant, and the case could not proceed without them.

This being so, and they being all citizens of the complainant State, it seems clear that original jurisdiction in this Court does not exist.

In *California* v. *Southern Pacific Co.*, 157 U.S. 229, *supra,* the City of Oakland and the Oakland Water Front Company were not named as defendants. This Court held that they were necessary parties. Considering the effect of this upon the jurisdiction the Court stated that the question was (pp. 261–262)—

> whether, where the Constitution provides that this court shall have original jurisdiction in cases in which the State is plaintiff and citizens of another State defendants, that jurisdiction can be held to embrace a suit between a State and citizens of another State and of the same State. We are of opinion that our original jurisdiction cannot be thus extended, and that the bill must be dismissed for want of parties who should be joined, but cannot be without ousting the jurisdiction.

The same result was reached in *Minnesota* v. *Northern Securities Co., supra; New Mexico* v. *Lane, supra;* and *Texas* v. *Interstate Commerce Commission, supra.* In *California* v. *Southern Pacific Co., supra,* and *Texas* v. *Interstate Commerce Commission, supra,* constitutional questions were presented. The present case is stronger than those

cited, in that the four citizen-defendants, whose presence ousts the jurisdiction, are named as defendants in the bill. Their duties show that they are necessary parties, they cannot be dispensed with, and their presence ousts the jurisdiction.

II

THIS SUIT IS PROHIBITED BY SECTION 3224, REVISED STATUTES

The provisions of the statute challenged by the complainant impose taxes. It follows, as repeatedly decided by this Court, that the enforcement of that statute could not be enjoined even upon the ground that it was unconstitutional. *Graham* v. *du Pont,* 262 U.S. 234; *Bailey* v. *George,* 259 U.S. 16. The Court could not assume jurisdiction unless there were further shown "some extraordinary and entirely exceptional circumstance" which rendered the provisions of the Revised Statutes inapplicable. *Dodge* v. *Osborn,* 240 U.S. 118, 122. Such circumstances are clearly described in the language which this Court used in *Fenner* v. *Boykin,* 271 U.S. 240, 243, concerning the enjoining of state officers from enforcing criminal laws, where it was said that that may not be done except under extraordinary circumstances "where the danger of irreparable loss is both great and immediate."

Such extraordinary and exceptional circumstances do not exist in the present case. There is no danger of any loss to the State itself. Nor does

the tax fall upon any individuals in any such manner as did the alleged tax which was held unconstitutional in *Hill* v. *Wallace,* 259 U.S. 44, 62. Neither is the tax one which has previously been adjudicated to be upon a product not taxable, or one in which the taxpayer had been misled into carrying on business through previous rulings of the taxing officials that the product sought to be taxed was nontaxable, as was found to be the case in *Miller* v. *Nut Margarine Co.,* 284 U.S. 498, where such circumstances were held sufficient to justify an injunction.

The bill which the State seeks to file shows nothing which takes the case out of the general rule that *even* if the tax were unconstitutional, its assessment and collection could not be enjoined.

If there is any exception to the application of Section 3224 of the Revised Statutes, this case is not within it. The effect of this section, as construed and applied by this Court, may be summed up as follows: If the assessment is of a tax for revenue purposes, made and attempted to be enforced by the proper revenue officers of the United States under color of their offices, its collection cannot be stayed by injunction. *Cheatham* v. *United States,* 92 U.S. 85; *State Railroad Tax Cases,* 92 U.S. 575; *Snyder* v. *Marks,* 109 U.S. 189; *Pacific Whaling Co.* v. *United States,* 187 U.S. 447; *Corbus* v. *Gold Mining Co.,* 187 U.S. 455; *Dodge* v. *Osborn,* 240 U.S. 118;

Dodge v. *Brady*, 240 U.S. 122; *Bailey* v. *George*, *supra*; *Graham* v. *du Pont*, *supra*; *Phillips* v. *Commissioner*, 283 U.S. 589, 595–596.

All of the results predicted by complainant in its proposed bill can be avoided by the payment of the tax sought to be enjoined. This tax is not one against the State. It is not one which attaches to the State in its governmental capacity, but is a business expense incurred in the operation of a business in which the State is engaging in its private corporate capacity. The State of Ohio in the sale of alcoholic beverages under its Liquor Control Act stands on the same footing upon which every other dealer stands in States where alcoholic liquors are sold for beverage purposes by individuals and private corporations, who add the internal revenue tax to the price of the liquor which is sold, and the purchaser pays it.

Section 3224, Revised Statutes, goes to the general jurisdiction of all courts. Its application here is an inhibition against the filing of the bill.

III

COMPLAINANT'S REMEDY AT LAW IS PLAIN, ADEQUATE, AND COMPLETE

The tax complained of is that imposed by R.S., Section 3244, *infra*, p. 17. Complainant's tax upon its retail stores is $4,675 (187 stores at $25). The number of wholesale establishments is not stated in the bill, but can hardly be large, and the

tax on each is $100. The tax is annual. Complainant is therefore in position to avoid, by a single money payment of moderate amount, all the embarrassments to itself and its officers suggested in the bill; and if the tax does not lawfully attach, is in position to recover it, with interest, against a perfectly solvent defendant, in one suit, which will also settle the question for the future. This ordinary remedy is both adequate and simple. No special and exceptional circumstances are suggested adequate to justify the extraordinary remedy of enjoining the Collectors. Even in the enforcement of the collection of state taxes, where Section 3224, Revised Statutes, is unavailing, this Court has denied injunctive relief where an adequate remedy at law exists. *Matthews* v. *Rodgers,* 284 U.S. 521; *Stratton* v. *St. L. S. W. Ry. Co.,* 284 U.S. 530.

In *State Railroad Tax Cases,* 92 U.S. 575, *supra,* this Court said (p. 613):

> The government of the United States has provided, both in the customs and in the internal revenue, a complete system of corrective justice in regard to all taxes imposed by the general government, which in both branches is founded upon the idea of appeals within the executive departments. If the party aggrieved does not obtain satisfaction in this mode, there are provisions for recovering the tax after it has been paid, by suit against the collecting officer. But there

> is no place in this system for an application to a court of justice until after the money is paid.

The validity of a tax cannot be challenged until it has first been paid. *Corbus* v. *Gold Mining Co., supra; Dodge* v. *Osborn, supra; Graham* v. *du Pont, supra.*

Governments have found it necessary to adopt stringent methods for the collection of taxes and to be rigid in the enforcement of them. The revenue measures of this country constitute a system which provides for their enforcement by officers commissioned for that purpose. This system provides safeguards of its own against mistake, injustice, or oppression, in the administration of such revenue laws. Appeals are allowed to specified tribunals as the lawmakers deem expedient. Remedies are also provided for recovering back taxes when illegally exacted. These factors lead the courts to deny injunctive relief where a taxpayer has failed to exhaust his legal remedies. This principle is announced in Section 723, Revised Statutes (U.S.C., Title 28, Sec. 384).

IV

THE UNITED STATES IS AN INDISPENSABLE PARTY

The United States is the real party in interest in this cause and is an indispensable party. *Morrison* v. *Work,* 266 U.S. 481; *Lambert Co.* v. *Balt. & Ohio R.R. Co.,* 258 U.S. 377, 382; *Texas* v. *Interstate*

Com. Comm., 258 U.S. 158, 164; *North Dakota* v. *Chicago & N. W. Ry. Co.*, 257 U.S. 485; *Wells* v. *Roper*, 246 U.S. 335; *New Mexico* v. *Lane*, 243 U.S. 52; *Louisiana* v. *McAdoo*, 234 U.S. 627; *Louisiana* v. *Garfield*, 211 U.S. 70, 78; *Oregon* v. *Hitchcock*, 202 U.S. 60, 68, 69; *Minnesota* v. *Hitchcock*, 185 U.S. 373, 387; *Kansas* v. *Colorado*, 185 U.S. 125. See *Arizona* v. *California*, 283 U.S. 423; *Massachusetts* v. *Mellon*, 262 U.S. 447. The United States may not be sued even by a State without its consent. *Kansas* v. *United States*, 204 U.S. 331, 342. Especially should this principle be invoked where, as here, no tax has as yet been paid. The title to the proceeds of the tax vests in the United States, which is interested in enforcing its payment. The question of whether the United States is a party to a controversy is not determined by the merely nominal party on the record, but by the question of the effect of the judgment or decree which can be entered. *Oregon* v. *Hitchcock, supra; Minnesota* v. *Hitchcock, supra.* The officers who are the nominal defendants have no pecuniary interest in the tax.

It has been held that suits against a Collector of Internal Revenue for the recovery of taxes erroneously paid are personal. *United States* v. *Sherman*, 98 U.S. 565; *Sage* v. *United States*, 250 U.S. 33. Yet where a question has been adjudged as between a taxpayer and the Government, or its official agent, the Commissioner of Internal Rev-

enue, the Collector, being an official inferior in authority, and acting under them, is in such privity with them that he is estopped by the judgment. *Tait* v. *Western Md. Ry. Co.*, 289 U.S. 620, 627. However, it seems that this Court did indicate in *Moore Ice Cream Co.* v. *Rose*, 289 U.S. 373, 380, 383, that in such suits the United States is the real party in interest, where it was held that the presence of the Collector as a defendant "is merely a remedial expedient for bringing the Government into court." It is urged that this principle is applicable where the suit is one to enjoin the collection of a tax.

In this connection it is urged that to come within the original jurisdiction of this Court, a suit by a State must be for redress of a wrong, or enforcement of a right, susceptible of judicial redress or enforcement. *Florida* v. *Mellon*, 273 U.S. 12, 16. Other States, in situations similar to that of complainant, have heretofore proceeded in the ordinary way without loss of sovereignty. *South Carolina* v. *United States*, 199 U.S. 437; *Board of Trustees* v. *United States*, 289 U.S. 48.

III

THE MERITS

We do not now discuss the merits in detail. This case, however, seems indistinguishable from *South Carolina* v. *United States*, 199 U.S. 437.

CONCLUSION

It is therefore respectfully submitted that the motion for leave to file the bill should be denied and the rule discharged.

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Special Assistants to the Attorney General.

APRIL 1934.

APPENDIX

Statutes Involved

Revised Statutes Sec. 3244 as amended (U.S.C., Title 26, Sec. 205):

* * * * *

> That retail dealers in liquors shall pay twenty-five dollars. Every person who sells, or offers for sale, foreign or domestic distilled spirits, wines, or malt liquors, otherwise than as hereinafter provided, in less quantities than five wine gallons at the same time, shall be regarded as a retail dealer in liquors. Wholesale liquor-dealers shall each pay one hundred dollars. Every person who sells, or offers for sale, foreign or domestic distilled spirits, wines, or malt liquors, otherwise than as hereinafter provided, in quantities of not less than five wine gallons at the same time, shall be regarded as a wholesale liquor-dealer. * * *

* * * * *

The other statutes cited in the bill (p. 12) do not impose additional taxes, but deal with the following:

Revised Statutes:

Sec. 3233 (U.S.C., Title 26, Sec. 182): duty to register.

Sec. 3235 (U.S.C., Title 26, Sec. 184): several locations, separate tax for each.

Sec. 3281 (U.S.C., Title 26, Sec. 193): penalty for nonpayment.

SUPREME COURT OF THE UNITED STATES.

No. — Orig.—October Term, 1933.

The State of Ohio, Complainant, *vs.* Guy T. Helvering, as an Individual and as Commissioner of Internal Revenue, and Thomas J. Connor, Carl E. Moore, Harry F. Busey, and Charles H. Graves, as Individuals and as United States Collectors of Internal Revenue in the State of Ohio.	Motion for Leave to File Bill of Complaint.

[May 21, 1934.]

Mr. Justice Sutherland delivered the opinion of the Court.

Upon the motion of complainant for leave to file a bill of complaint invoking the original jurisdiction of this court, a rule was issued directing the defendants to show cause why such leave should not be granted. Defendants, by their return to the rule, oppose the motion upon the ground, among others, that the merits have been conclusively settled against complainant by prior decision of this court.

The bill alleges that the defendant Helvering is Commissioner of Internal Revenue, and that the other defendants are collectors of internal revenue in the several internal revenue districts in the State of Ohio; that on December 22, 1933, the state legislature passed an act providing a system of control for the manufacture, sale and importation of, and traffic in, beer and intoxicating liquors within the state, and creating a state monopoly for the distribution and sale of all spirituous liquors under a department of liquor control; that the state has purchased intoxicating liquors at a cost of more than $4,500,000 for sale to permit-holders and to the public through its state stores, each of which will be entirely and exclusively state owned, managed and controlled; that the state is about to open in the various counties one hundred and eighty-

seven such state liquor stores; that defendants have threatened to, and unless enjoined by this court will, levy and collect excise taxes on the agencies and operations of the state in the conduct of its department of liquor control, and enforce against the state, its officers, agents and employees, penalties for nonpayment of taxes imposed by § 3244, R. S. (U. S. C., Title 26, § 205), and other designated statutes of the United States; that complainant is not subject to these statutes and is immune from any tax imposed thereby; and that the acts of Congress which impose such taxes do not by their terms include a state, or its officers or employees, and were not intended to do so. It is further alleged that the circumstances of the case are extraordinary and exceptional in several respects, among them being that the attempt is to tax a sovereign state; and it, therefore, is contended that the equity power of the court is properly invoked under the principles stated in *Hill* v. *Wallace*, 259 U. S. 44, 62.

The state act deals with the subject in great detail; but for present purposes the provisions set forth in the bill to which we have just referred are all that require consideration.

The provisions of the federal statutes, so far as necessary to be stated, follow:

U. S. C., Title 26, § 205 (R. S., § 3244, as amended):

"(a) *Retail liquor dealers.*—Retail dealers in liquor shall pay $25. Every person who sells or offers for sale foreign or domestic distilled spirits, wines or malt liquors otherwise than as hereinafter provided in less quantities than five wine gallons at the same time shall be regarded as a retail dealer in liquors.

"(b) *Wholesale liquor dealers.*—Wholesale liquor dealers shall each pay $100. Every person who sells, or offers for sale foreign or domestic distilled spirits, wines or malt liquors, otherwise than as hereinafter provided in quantities of not less than five wine gallons at the same time shall be regarded as a wholesale liquor dealer."

U. S. C., Title 26, § 11 (R. S., § 3140):

". . . where not otherwise distinctly expressed or manifestly incompatible with the intent thereof, the word 'person,' as used in this title, shall be construed to mean and include a partnership, association, company, or corporation, as well as a natural person."

Putting aside various preliminary questions raised by defendants (compare *Ex parte Bakelite Corp'n*, 279 U. S. 438, 448; *Charles River Bridge* v. *Warren Bridge*, 11 Pet. 420, 553), we pass at once

to the fundamental question involved in the state's challenge to the validity of the tax. That challenge seeks to invoke a principle, resulting from our dual system of government, which frequently has been announced by this court and is now firmly established,—that "the instrumentalities, means and operations whereby the States exert the governmental powers belonging to them are . . . exempt from taxation by the United States." *Indian Motocycle Co.* v. *United States*, 283 U. S. 570, 575; *M'Culloch* v. *Maryland*, 4 Wheat. 316, 436; *The Collector* v. *Day*, 11 Wall. 113; and other cases cited in *Trinityfarm Construction Co.* v. *Grosjean*, — U. S. —, March 5, 1934. But, by the very terms of the rule, the immunity of the states from federal taxation is limited to those agencies which are of a governmental character. Whenever a state engages in a business of a private nature it exercises non-governmental functions, and the business, though conducted by the state, is not immune from the exercise of the power of taxation which the Constitution vests in the Congress. This court, in *South Carolina* v. *United States*, 199 U. S. 437, a case in no substantial respect distinguishable from the present one, definitely so held. Compare *Board of Trustees* v. *United States*, 289 U. S. 48, 59.

The *South Carolina* case arose under a state statute, which, like the one at bar, created a monopoly and prohibited the sale of intoxicating liquors except at dispensaries to be operated by the state. This court, while sustaining the validity of the statute and fully accepting the rule that the national government was without power to impose a tax in any form which had the effect of prohibiting the full discharge by the state of its governmental functions, held that "whenever a State engages in a business which is of a private nature that business is not withdrawn from the taxing power of the Nation." The decision sustained the identical tax provisions involved in the present case, and, therefore, we follow it as controlling.

A distinction is sought in the fact that after that case was decided the Eighteenth Amendment was passed, and thereby, it is contended, the traffic in intoxicating liquors ceased to be private business, and then with the repeal of the amendment assumed a status which enables a state to carry it on under the police power. The point seems to us altogether fanciful. The Eighteenth Amend-

ment outlawed the traffic; but, certainly, it did not have the effect of converting what had always been a private activity into a governmental function. The argument seems to be that the police power is elastic and capable of development and change to meet changing conditions. Nevertheless, the police power is and remains a governmental power, and applied to business activities is the power to regulate those activities, not to engage in carrying them on. *Rippe* v. *Becker*, 56 Minn. 100, 111-112. If a state chooses to go into the business of buying and selling commodities, its right to do so may be conceded so far as the federal Constitution is concerned; but the exercise of the right is not the performance of a governmental function, and must find its support in some authority apart from the police power. When a state enters the market place seeking customers it divests itself of its *quasi* sovereignty *pro tanto*, and takes on the character of a trader, so far, at least, as the taxing power of the federal government is concerned. Compare *Georgia* v. *Chattanooga*, 264 U. S. 472, 480-483; *U. S. Bank* v. *Planters' Bank*, 9 Wheat. 904, 907; *Bank of Kentucky* v. *Wister*, 2 Pet. 318, 323; *Briscoe* v. *Bank of Kentucky*, 11 Pet. 257, 323-325; *Curran* v. *State of Arkansas*, 15 How. 304, 309.

We find no merit in the further contention that a state is not embraced within the meaning of the word "person," as used in U. S. C., Title 26, § 205 and defined in § 11, *supra*. By § 205 the tax is levied upon every "person who sells, etc."; and by § 11 the word "person" is to be construed as meaning and including a partnership, association, company or corporation, as well as a natural person. Whether the word "person" or "corporation" includes a state or the United States depends upon the connection in which the word is found. Thus, in *Stanley* v. *Schwalby*, 147 U. S. 508, 517, it is said that the word "person" in the statute there under consideration would include the United States as a body politic and corporate. See also *Giddings* v. *Holter*, 19 Mont. 263, 266; *State* v. *Herold*, 9 Kan. 194, 199. A state is a person within the meaning of a statute punishing the false making or fraudulent alteration of a public record "with intent that any person may be defrauded." *Martin* v. *State*, 24 Texas 61, 68. Under a statute defining a negotiable note as a note made by one person whereby he promises to pay money to another person, and providing that the word "person" should be construed to extend to every corporation capable by law of making contracts, it was held that the

word included a state. *State of Indiana* v. *Woram*, 6 Hill (N. Y.) 33, 38. And a state is a person or a corporation within the purview of the priority provisions of the bankruptcy act.* *In re Western Implement Co.*, 166 Fed. 576, 582. Compare *In re Jensen*, 59 N. Y. Supp. 653, 655; *Bray* v. *Wallingford*, 20 Conn. 416, 418; *County of Lancaster* v. *Trimble*, 34 Neb. 752, 756; *Rains* v. *City of Oshkosh*, 14 Wis. 372, 374; 1 Black. Comm. 123.

In the *South Carolina* case this court disposed of the question by holding that since the state was not exempt from the tax, the statute reached the individual sellers who acted as dispensers for the state. While not rejecting that view, we prefer, in the light of the foregoing examples, to place our ruling upon the broader ground that the state itself, when it becomes a dealer in intoxicating liquors, falls within the reach of the tax either as a "person" under the statutory extension of that word to include a corporation, or as a "person" without regard to such extension. The motion for leave to file the bill of complaint, accordingly, is

Denied.

Mr. Justice STONE concurs in the result.

A true copy.

Test:

Clerk, Supreme Court, U. S.

*U. S. C., Title 11, § 104 (b) (5)—"debts owing to any person who by the laws of the States or the United States is entitled to priority." This construction is explicitly adopted by the amendment of May 27, 1926, c. 406, § 15, 44 Stat. 666; U. S. C., Supp. VII, Title 11, § 104 (b) (7).